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In The
Supreme Court of the United States
October Term, 1985

ROBERT W. AKERS;
CALIFORNIA CATTLEMEN'S ASSOCIATION;
CALIFORNIA FARM BUREAU FEDERATION;
and NATIONAL CATTLEMEN'S ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Section 404(f)(1), 33 U.S.C. § 1344(f)(1), provides an exemption from wetland dredge and fill regulation by the Army Corps of Engineers for agricultural activities. Section 404(f)(2), 33 U.S.C. § 1344(f)(2), makes the Section 404(f)(1) exemption inapplicable to certain practices. Does Section 404(f)(2) obviate the agricultural exemption when a farmer wishes to change from a wetland crop to an upland crop, or when a farmer wishes to rotate from one wetland crop to a different wetland crop and that change might alter an area's hydrological regime?

PARTIES BELOW

The parties in the action below were the following:

1. Plaintiff-appellee—United States of America.

2. Defendants-appellants—Robert W. Akers, a farmer; John Doe Equipment Operator.

3. Plaintiffs-intervenors-appellees—National Audubon Society and National Wildlife Federation.

4. Defendants - intervenors - appellants — California Cattlemen's Association, a nonprofit California corporation; California Farm Bureau Federation, a nonprofit California corporation with a membership of 52 county farm bureaus which have a combined membership of over 100,000 farm families; National Cattlemen's Association, a nonprofit corporation, composed of 245,000 individual and 50 state-association members.

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No. _____

In The
Supreme Court of the United States
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ROBERT W. AKERS;
CALIFORNIA CATTLEMEN'S ASSOCIATION;
CALIFORNIA FARM BUREAU FEDERATION;
and NATIONAL CATTLEMEN'S ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Robert W. Akers, California Farm Bureau Federation, California Cattlemen's Association, and National Cattlemen's Association, respectfully request that this Court issue a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit. That decision allows the Army Corps of Engineers (Corps) to maintain dredge and fill regulatory permitting jurisdiction over substantial portions of Mr. Akers' farmland, as well as millions of additional farmland acres throughout the United States. By the decision, a farmer must obtain a

permit in two particular instances at issue. First, a permit must be obtained wherever a farmer wishes to change from a wetland crop to an upland crop. Second, a permit is required for changes from one wetland crop to another wetland crop when such a change may alter the "hydrological regime." The Ninth Circuit's pronouncement on the reach of the Corps' regulatory jurisdiction contradicts the plain language as well as the unambiguous intent of Congress to exempt certain agricultural activities from federal regulation. The reach of the Corps' regulatory jurisdiction is a critical decision that should be decided by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 785 F.2d 814 (9th Cir. 1986). The opinion was filed March 26, 1986, and judgment filed April 21, 1986. The opinion is reproduced in petitioners' Appendix B.[1]

The opinion of the District Court is not officially reported. That court's findings of fact and conclusions of law and order granting preliminary injunction were filed January 15, 1986, and are reproduced in Appendix C.

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[1] All of the references cited in this petition may be found in the record and are available under Supreme Court Rule No. 19.1. In addition, certain references are also included in the appendix to this petition, as indicated.

JURISDICTION

The opinion of the Court of Appeals was filed March 26, 1986, and judgment filed April 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

At issue in this case is the meaning and extent of the agricultural exemptions to Section 404 of the Clean Water Act. The exemptions found at Section 404(f) of the Act, codified at 33 U.S.C. § 1344(f), are reproduced in full in Appendix A. Section 404(f) reads in relevant part:

> "(f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—
>
> "(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> . . . .
>
> "is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).
>
> "(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be

reduced, shall be required to have a permit under this section."

———o———

STATEMENT OF THE CASE

Millions of acres of American farmland can be classified as wetlands. In 1984 Robert Akers, petitioner, purchased farmland in Northern California which, according to the Army Corps of Engineers, encompasses approximately 2,800 acres of wetlands.[2] Like all good farmers and ranchers Mr. Akers sought to modernize his farming operation by altering crop patterns, intensifying irrigation activities, and generally upgrading the efficiency of the operation. The land owned by Mr. Akers has been in continuous production since 1897. Opinion, Appendix at B-10. Except for a few sporadic attempts at growing cereal grains the land has been used primarily for the cultivation of meadow hay. Opinion, Appendix at B-10; Findings, Appendix at B-8. Meadow hay cultivation on Mr. Akers' property involves the use of traditional wild flood irrigation to ensure soil saturation in the spring. The fields have always been drained before harvest in order to allow mechanized cutting and baling of the dry hay. At issue in this appeal are two particular modernization programs that Mr. Akers attempted to implement. First, he tried to convert some areas under wetland meadow hay cultivation to upland grain cultivation. Second, Mr. Akers tried to convert some of the meadow hay cultivation to wetland wild rice farming. The Army Corps of Engineers asserts that Mr. Akers

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[2] A portion of this wetlands acreage was recently sold. However, Mr. Akers retains a significant portion of wetlands farmland.

must first obtain a Clean Water Act § 404 dredge and fill permit before he may proceed with either of these programs.

Congress recognizes the importance of natural wetlands for flood control, fisheries, and migratory bird populations. For this reason it passed Section 404 of the Clean Water Act, codified at 33 U.S.C. § 1344, to preserve and protect this country's wetlands. Congress was well aware, however, that an overbroad reading of the Clean Water Act could unjustifiably and adversely affect the ability of farmers and ranchers to carry on their day-to-day operations. Farming and ranching, by their inherent nature, must alter and affect the character and use of land, but the tremendous benefits derived generally far outweigh any concern over the conversion of wetland farming to upland farming or alternative types of wetland farming. Thus, Congress enacted a well-balanced statute that not only preserves the ability of farmers to efficiently and independently manage their operations but also protects this nation's wetland environments to the maximum extent practicable. It is this balance, crucial to farming operations throughout the United States, that is at stake in this lawsuit.

What Congress did that is essential to American agriculture is pass a regulatory exemption to the Section 404 permit procedures for a wide range of agricultural activities including cultivation, irrigation works, and road building. When Mr. Akers commenced his upgrade activities the Corps began attempts to regulate Mr. Akers' activities through the Section 404 permitting process. Findings, Appendix at C-2 - C-4; Opinion, Appendix at B-3 - B-5. Mr. Akers, however, believed that his activities were within

the Section 404(f) agricultural exemptions and proceeded, for a time, with his farming operations. In response to Mr. Akers' activities the Corps obtained a temporary restraining order preventing Mr. Akers from conducting farm modernization activities on his property. The temporary restraining order was granted and later, after a hearing before the United States District Court, Eastern District of California, a preliminary injunction was granted. Findings, Appendix at C-24. After a motion for reconsideration was denied, Mr. Akers appealed to the Ninth Circuit Court of Appeals. The appellate court affirmed the granting of the preliminary injunction by the District Court. Opinion, Appendix at B-20.

Mr. Akers, the California Cattlemen's Association, the National Cattlemen's Association, and the California Farm Bureau Federation all believe that the Ninth Circuit made serious legal errors in upholding the preliminary injunction. Not at issue here is any of the factual record of the protracted and often strained struggle between Mr. Akers and the Corps. Rather, at issue are two specific legal interpretations of the agricultural exemption which have a substantial effect not only on Mr. Akers but also on many individual farmers and ranchers who are members of California Cattlemen's Association, National Cattlemen's Association, and California Farm Bureau Federation.

Specifically, the court ruled that the exemption in Section 404(f)(1)(A) for "normal farming" does not apply when a farmer wishes to start upland farming operations on an area previously limited to wetlands agriculture. Opinion, Appendix at B-10 - B-11.

Additionally, while the court correctly held that "[w]e do not believe that Congress intended to place the burden

of Corps permit regulation on farmers who desire merely to change from one wetland crop to another," Opinion, Appendix, at B-11, the court erroneously qualified this statement by saying that classified as "nonexempt [are] those activities which change a wetland's hydrological regime." Opinion, Appendix at B-16 - B-17. In other words a conversion from one wetland crop such as wild hay to another wetland crop such as wild rice would still require a permit if the hydrological regime were to be altered. The placing of crop borders, spreader dams, and disking all conceivably could affect an area's surface and subsurface water flow, duration, and quantity thereby affecting the "hydrological regime," and invoking Corps jurisdiction. The regulatory process, with all of its concomitant burdens and delays, is one which farmers must avoid and which Congress intended them to avoid. Otherwise, farmers will not be able to timely make the necessary day-to-day management decisions that are part of farming such as when and how to flood or drain a field or when and what type of crop to plant. The Court's restrictive reading of this agricultural exemption cannot be supported either by the plain language of the statute or the legislative history of the Act.

THE BASIS FOR JURISDICTION BELOW

Jurisdiction in the Court of Appeals for the Ninth Circuit was pursuant to 28 U.S.C. § 1292(a)(1).

REASONS FOR GRANTING THE WRIT

I

INTRODUCTION

> "[*T*]*he supervision of agriculture and of other concerns of similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the Federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.*" *The Federalist No. 17,* (A. Hamilton) (J. Cooke ed. 1961).

The day-to-day regulation of agriculture is not the proper province of the federal government. The constitutional framers recognized this truth, as did the United States Congress when it passed the agricultural exemption to the Clean Water Act. Much debate has been heard over the years as to where the proper limits of federal regulation of agriculture lie. Here, Congress plainly set the limits of federal regulation and power over agriculture; by usurping this power the Army Corps of Engineers is creating those very "troublesome" ills predicted by Hamilton. As long as the Corps remains mired in its regulatory excess, we will continue to see the will of Congress flouted and the dignity of the national government diminished at the direct expense of many thousands of farmers throughout the nation.

II

THE PLAIN LANGUAGE OF THE CLEAN WATER ACT CLEARLY EXEMPTS FROM REGULATION ACTIVITIES SUCH AS THOSE PERFORMED BY AKERS

Section 404(f) of the Clean Water Act, codified at 33 U.S.C. §1344(f), provides an exemption for a range of farming, silviculture, and ranching activities from the regulatory jurisdiction of the Army Corps of Engineers. Section 404(f) reads in relevant part:

> "(f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—
>
> "(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> ....
>
> "is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).
>
> "(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section."

Thus, to qualify for the exemption, Mr. Akers must be engaged in normal farming activities. It is undisputed that

he was. Mr. Akers also must not be putting the area to a use to which it was not previously subject if that new use alters the hydrological regime. It is also undisputed that the area has been continuously farmed throughout this century and that farming is the only anticipated use.

A. Normal Farming Activities Are Exempt from Corps Regulation

Section 404(f)(1)(A) exempts normal farming and ranching activities from the Corps' regulatory jurisdiction. The subsection also lists certain specific activities as being within this exemption. However, because the list is preceded by the words "such as" the list is not exclusive. What is relevant is whether or not Mr. Akers' activities constitute "normal farming." No allegations have ever been advanced that the activities of Mr. Akers were for any purpose but farming. His farmland is not being converted into a housing development, golf course, or shopping center; the past, present, and anticipated future use is for farming and only farming.

The regulations promulgated by the Army Corps of Engineers for this exemption, 33 C.F.R. § 323.4 (1985), and proposed regulation 33 C.F.R. § 232.3, located in 49 Federal Register 39,019 (1984), help define the scope of normal farming activities. Specifically, they are required to be "part of an established (*i.e.*, on going) farming, silviculture, or ranching operation." It is undisputed that the Akers' property has been farmed since the turn of the century. *See* Opinion, Appendix at B-10. The activities of Mr. Akers will not bring any unfarmed area into farm

production; the activities will only modernize and intensify the established farming uses of the property.

B. Subsection (f)(2) Does Not Negate the Exemptions of Subsection (f)(1) Because Mr. Akers Is Not Bringing the Subject Property into a New Use

Section 404(f)(2) of the Clean Water Act states that the exemptions outlined in Subsection (f)(1) do not apply when there is a "discharge of dredged or fill material . . . incidental to any activity having as its purpose bringing an area of the navigable waters *into a use to which it was not previously subject,* where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." (Emphasis added.)

The Court of Appeals stated that this "recapture" provision applies to any activity that may alter a wetland's hydrological regime: "Nonexempt [are] those activities which change a wetland's hydrological regime." Opinion, Appendix at B-16 - B-17. This is clear error and presents an important federal question over the reach of the Army Corps of Engineers' jurisdiction. The recapture provision, by its plain language, applies only to activities which put an area "into a use to which it was not previously subject. Circuit courts have correctly reasoned that when a farmer attempts to put previously *unfarmed* land into production by destroying or altering an existing wetland, then Section (f)(2) applies. *See, e.g., United States v. Huebner,* 752 F.2d 1235 (7th Cir. 1985), *cert. denied,* — U.S. —, 88 L. Ed. 2d 50 (1985); *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897 (5th Cir. 1983). However, when a farmer rotates crops he is not

putting land into a use to which it was not previously subject. The recapture provision is absolutely and totally inapplicable.

Changing from a wetland farming use to an upland farming use continues "normal farming" of an area despite any change in the hydrological regime. Likewise, a change from one wetland crop such as wild hay cultivation to another wetland crop such as wild rice cultivation most certainly is a continuation of normal farming notwithstanding a potential change in the hydrological regime.

The applicability of the recapture provision is crucial to many thousands of farmers throughout the United States. Congress never intended that the Clean Water Act would straitjacket farmers wishing to change crop patterns, or simply intensify existing cultivation. Congress recognized that farmers should not have to fear that every time they do something that might affect their farmland's hydrological regime they will suddenly be subject to Corps regulation. Rather, the agricultural exemption was intended to protect such farmers from the threat of regulation.

The subsection 404(f)(2) exception was intended to prohibit using the guise of agricultural development to hide a conversion of land from one use to another and different use. However, Section 404(f)(2) in no way can be reasonably construed to prohibit the intensification or modification of an existing agricultural use. Normal farming is normal farming whether it be for upland or lowland crops. The rotation between crops, for example, from hay to wheat or vice versa, is *not* putting the land to a use to

which it was not previously subject. If farmers and ranchers must approach the Corps for permission to engage in normal crop management then the exemptions of Congress are meaningless.[3]

III

CONGRESS INTENDED THE AGRICULTURAL EXEMPTIONS TO THE CLEAN WATER ACT TO APPLY TO A FULL RANGE OF AGRICULTURAL ACTIVITIES

The plain language of the exemptions to the Clean Water Act leaves little ambiguity. The Court of Appeals held that these exemptions do not encompass a full range of normal farming activities. Furthermore, it stated that the legislative history of the amendments to the Clean Water Act reveal that the exemption must be very narrowly construed so that only very few farming-related activities will be allowed by the Corps to proceed without permit requirements. Opinion, Appendix at B-8 - B-9. However, when the entire legislative history is examined, it becomes abundantly clear that Congress had every intention to exclude normal farming activities, such as crop rotations, from the domain of the Army Corps of Engineers. Furthermore, it is plain that the activities of Mr. Akers fall well within the congressional intent.

The Court of Appeals relied on an isolated statement made during debate by Representative Harsha for the

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[3] Finally, it should be noted that a literal reading of the exemption provides even less support to the Court of Appeals' position. The exemption does not speak of uses to which lands were *subjected* to but to uses the lands were *"subject to."* Thus, if a wetland area was merely subject or susceptible to farming uses, there is a valid argument that it should come within the exemption.

proposition that no agricultural activity is exempt which somehow affects a wetland's hydrological regime. Opinion, Appendix at B-17. However, a statement in debate should not and must not be allowed to refute the plain and obvious meaning of a statute. *See, e.g., Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 474 (1921) (it is "well established that the debates in Congress expressive of views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of a lawmaking body"); *Caminetti v. United States,* 242 U.S. 470, 490 (1917) (weight given to plain meaning of statute, despite language of congressional report). Nor does such an isolated statement refute the overwhelming evidence obtained from an examination of the entire debate, that Congress had every intention for the agricultural exemption to apply to a wide range of legitimate agricultural activities. Although resort to isolated examples from legislative debate is not particularly useful, it is also established that an understanding of the entire debate can be helpful to establish what problems or evils the Legislature was trying to remedy. *See, e.g., Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 50 (1911) (debates shed light on "environment" and "history" behind the Sherman Act). Here it is obvious that Congress passed the agricultural exemptions to relieve farmers from the spectre of excessive regulation.

After Congress enacted the Clean Water Act in 1972 the Army Corps of Engineers expanded the scope of its jurisdiction over navigable waterways to further include all those waters affecting navigable waterways, including wetlands. Soon thereafter the Corps began to promulgate

regulations which would have extended its regulatory control into the day-to-day activities of all farming in wetlands areas and even those areas that were merely farmlands with high seasonal saturations.[4]

In response to the Corps' attempt to expand excessively its jurisdiction under the 1972 Clean Water Act, Congress in 1977 passed the Section 404(f) exemptions the scope of which is the subject of this petition. The intent of these exemptions clearly was to remove the Corps' regulatory jurisdiction from normal farming activities. Even with the proposed exemptions, however, there remained a certain amount of wariness of the Corps among many members of the Senate. Led by Senator Bentsen these members attempted to pass an additional amendment to the Clean Water Act which would have removed wetlands entirely from Section 404 regulation. It is most telling to note that during the debate over Senator Bentsen's amendment, the Senate was repeatedly assured that the Section 404(f) exemptions alone would relieve farmers from the

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[4] During the Senate debate over the 1977 Amendments to the Clean Water Act Senator Muskie stated:

> "The corps proceeded to take [the Clean Water Act] and . . . expand it far beyond any intent of the Congress so that it found itself threatening regulation in areas of the country which the corps had never imagined it had any jurisdiction over.
>
> "We all began to get letters from farmers, foresters, ranchers, from people whose activities in the mind of Congress were not in the slightest bit intended to be affected . . . ." *See Environmental Policy Division of the Congressional Reference Service, a Legislative History of the Water Pollution Control Act Amendments of 1972 (Legislative History)* at 948 (Comm. Print 1973).

type of excessive regulatory jurisdiction that the senators were concerned with.

For example, in introducing the amendment that would have excluded wetlands from Clean Water Act regulation Senator Bentsen stated:

> "I find it offensive that before a small farmer can dig new irrigation ditches he must first write the U.S. Army for permission, complete the necessary Federal forms, and then wait an average of 125 days while his request is shuffled from one bureaucrat's in-box to another. I also find it offensive that a farmer who has paid hard-earned money for new land 2 years ago may now be prohibited by the Government from improving that land for agriculturally productive uses, and will not receive a penny in just compensation for his loss of income from the property." *Legislative History* at 905.

In response, Senator Bentsen was assured that the proposed 404(f) exemption alone would free farmers from excessive government regulations. As Senator Hart stated, the exemption "does exempt activities which are normal farming or agricultural activities, run by individuals or family farmers." *Legislative History* at 907-08. *See also* remarks of Senator Stafford at 912 and remarks of Senator Baker at 922 ("[t]he committee's amendment [Section 404(f)] has responded to this confusion and makes it clear, for example, that normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, harvesting, upland soil and water conservation practices and minor drainage are excluded from section 404 altogether").

Despite these reassurances there was still some uneasiness by some senators. Senator Domenici, in support of Senator Bentsen's amendment, stated:

> "I think we have an opportunity here in the Senate to undo something that has grown up that we really never intended, and not to continue to ignore the fact that we never intended under section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, people involved in forestry, anyone that is moving a little bit of earth anywhere in this country that might have an impact on navigable streams. We just did not intend that.
>
> . . . .
>
> "We exempt ordinary farming, but farming should not have been involved to begin with. So *the farmer still does not know whether his activity is normal or not.*" *Legislative History* at 924 (emphasis added).

Senator Hart reassured Senators Domenici and Bentsen that the proposed 404(f) exemptions would cover farmers. Senator Hart stated:

> "Every proposal before the Senator, every one, is designed to exempt those normal activities from that kind of overregulation by the Corps of Engineers or anybody else. Any argument that is made on the floor to the contrary simply misrepresents one or the other of the proposals upon which we will be asked to vote before this debate is over.
>
> . . . .
>
> "The committee Amendment [Section 404(f)] also specifically exempts the construction and maintenance of agricultural irrigation ditches and the maintenance of agricultural drainage ditches." *Legislative History* at 928.

The debate continued. Senator Dole stated "[w]ithout this [the Bentsen] amendment, our farmers and ranches and others could be subjected to unnecessary bureaucratic harassment." *Legislative History* at 938. Once again the senators were reassured that the 404(f) exemption protected the farmers although the Corps should continue to have jurisdiction over wetlands because without that jurisdiction there would be "an open invitation for the dredgers of this country to find wetland areas for the disposal of their contaminated waste and spoil. If we adopt the [Bentsen] amendment, that is what will happen." Statement of Senator Muskie, *Legislative History* at 940. Despite the misgivings of the senators who wished to pass the Bentsen amendment, the Senate ultimately decided that farmers would be fully protected by the Section 404(f) exemptions. The Bentsen amendment was not passed.

This legislative history is highly relevant to the proper interpretation of Section 404(f). In this debate it is clear that normal day-to-day farming activities, such as crop rotations or increasing of efficiencies or modernizations of farmland, were to be covered under the 404(f) exemptions. If there had been any credible evidence that normal farming activities such as those conducted by Mr. Akers were not to fall within the exemption then the Senate would not have passed the exemptions without further modifications. Instead, the exemptions were passed in their present form because the senators believed that the 404(f) amendment completely precluded the Army Corps of Engineers from asserting its jurisdiction over the lives and day-to-day management decisions of America's farmers.

It should be further noted that Section 404(f)(2) was intended only to preclude the change from an agricultural use into another use or vice versa under the guise of "farming activities" and was not intended to affect change *among* farm uses. Section 404(f)(2) was most certainly not intended to preclude the changing of one crop to another crop. The Senate had no intention of forever preventing farmers from engaging in necessary and essential crop rotations or intensifications of existing agricultural uses. It only intended to prevent the conversion of wetlands into radically new uses. For example, in the Senate debates it was stated by Senator Stafford that "permit review is necessary for discharges to convert a hardwood swamp to another use through construction of dikes or drainage channels." *Legislative History* at 913.

Finally, it should be noted that the House of Representatives also believed that the agricultural exemptions would be applied to a broad range of farming activities. In the House debate of April 5, 1977, of H.R. No. 199, a substantively identical exemption to Section 404(f) was debated. The agricultural exemption Section 404(h), *reprinted in Legislative History* at 1240, was the subject of the comments of representatives Harsha and Cleveland who stated that "[t]his procedure would exempt by statute *virtually all agricultural operations* by straight exemption of a list of specific activities from any requirement for any permit whatsover." *Legislative History* at 1265 and 1298 (emphasis added).

Subsequent judicial decisions involving the applicability of the agricultural Section 404(f) exemptions support the argument that Congress intended to exempt normal agricultural activities from the Corps' jurisdiction, but it did

not intend to exempt wholesale conversions of nonfarmland into farmland. For example, in *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, it was correctly determined that the agricultural exemptions could not apply to a massive land clearing, swamp drainage, and cypress forest removal program designed to put previously nonagricultural land into agricultural use. *Id.* at 925-27. Clearly, the exemptions could not apply to an area where no agricultural activities had occurred and where farming could not begin until the completion of the wetlands removal program. In *United States v. Huebner,* 752 F.2d 1235, the court also held that to the extent that nonagricultural wetlands were being converted into agricultural lands the Section 404(f) exemption did not apply.

In this case the wetlands have been used for farming for generations and will remain in agricultural use for the foreseeable future. Nonagricultural land is not being converted into agricultural land and agricultural land is not being converted into nonagricultural land.

Congress did not intend to regulate the activities of Mr. Akers. Congress did not intend to allow the intrusion of federal regulation into the day-to-day activities of this nation's farmers. Rather, Congress intended to prevent the wholesale pollution or alteration of this nation's wetlands by industrialists or developers who were not engaging in legitimate ongoing farming or silvicultural activities. Because none of Mr. Akers' farm activities involve the conversion of farmland into nonfarm uses, and because there is *no* credible factual evidence that his activities fall outside of the exemptions, he should never have been subjected to the Corps' Section 404 regulatory jurisdiction.

IV

CONCLUSION

The Ninth Circuit held that the Army Corps of Engineers has Section 404 permitting jurisdiction over farming activities that merely involve rotation from wetland crops to upland crops, or from one wetland crop to another wetland crop which may affect the farmland's hydrologial regime. This errant holding will negatively affect the management flexibility and practices of countless farmers nationwide and has converted the Army Corps of Engineers into these farmers' managing general partner. Whether Congress intended such a result is an important question of federal law which has not been, but should be, settled by this Court. For these reasons and those stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: June, 1986.

APPENDIX A

Title 33 U.S.C. § 1344:

"(f) Non-prohibited discharge of dredged or fill material

"(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

"(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

"(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

"(C) for the purpose of construction or maintenance of farms or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

"(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

"(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

"(F) resulting from any activity with respect to which a State has an approved program under section

1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

"(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section."

APPENDIX B

UNITED STATES of America,

Plaintiff-Appellee,

v.

Robert W. AKERS and John Doe Equipment Operator,

Defendants-Appellants.

No. 85-1750.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 12, 1985.

Decided March 26, 1986.

Before WRIGHT, KENNEDY and BEEZER, Circuit Judges.

EUGENE A WRIGHT, Circuit Judge:

This litigation is the unfortunate result of a standoff between a California farmer who seeks to farm his wetlands more productively and the Army Corps of Engineers

which regulates wetland use under the Clean Water Act ("Act"), 33 U.S.C. §§ 1251-1376 (1982 & Supp. I 1984). The Corps succeeded in enjoining dredge and fill activities for which a permit had not been sought. We are asked to construe the Act's exemptions and review the scope of the preliminary injunction awarded to the government. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

BACKGROUND

In January 1984, Robert W. Akers purchased approximately 9,600 acres in Lassen and Modoc Counties, near Bieber, California. The property includes 2,889 acres of wetlands, known locally as the "Big Swamp." Ash Creek, a tributary to the Pit River, flows across the property. The Pit River, Ash Creek, and their channels and adjacent wetlands are subject to the Corps's jurisdiction under Section 404 of the Act, 33 U.S.C. § 1344 (1982).[1]

Big Swamp is an important wildlife habitat. It provides seasonal refuge for numerous species, including the bald eagle and peregrine falcon, both endangered species, the greater sandhill crane, listed as rare by California authorities, and the cackling Canada goose, whose numbers have decreased sharply in recent years. Less threatened species including Canada geese, snow geese, and mallard, pintail, shoveler and cinnamon teal ducks, also inhabit the area.

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1. Akers concedes, for purposes of this case, that portions of his property are "wetlands" under the Corps's expansive definition, 33 C.F.R. § 323.2(c) (1985). His principal contention, however, is that his activities are exempt.

The following chronology summarizes Akers' battle with the Corps over Big Swamp farming:

March 1984	Corps learned of Akers' "farming plan" to carry out extensive grading, leveling, drainage and water diversion to convert the wetlands to farm land suitable for growing upland crops. After a preliminary investigation, the Corps determined that its jurisdiction extended to roughly one-third of Akers' property and that a Section 404 permit would be required.
May 4	Akers sued the government for declaratory and injunctive relief under the Act alleging that the Corps's assertion of regulatory jurisdiction was improper and illegal. TRO issued enjoining Corps from asserting regulatory jurisdiction over Akers until hearing on motion for preliminary injunction. The order also enjoined Akers from construction activities.
May 15	Akers' motion for preliminary injunction was denied.
July 16	Akers voluntarily dismissed his lawsuit. He began the first of three phases of earthmoving activity. Along the western border of his property, he built a dike 3,500 feet long, two to three feet high and six feet wide. He first told the Corps he was ditch cleaning, but later said he was repairing a pre-existing temporary irrigation structure.
Late July or early August	Corps determined that Akers needed a permit and issued a cease and desist order. By that time, the project was finished.

August 13	Corps withdrew cease and desist order based on assurances that the dike would be used only for the purposes that the previous structure had served (although new dike was longer and in a different location).
August 30	Akers was informed by the Corps's District Engineer ("DE") that 2889 acres of his farm contained wetlands within the Corps's jurisdiction.
September 2	Corps learned of work in central portion of wetlands.
September 13	Corps's aerial survey revealed two-mile long dike had been constructed east-to-west through the wetlands. On the west end, the dike connected perpendicularly to the other recently-constructed dike on the western property line. A grader and tractor (pulling discs) were seen along the dike. Some wetlands south of the dike had been leveled. Corps issued a cease and desist order.
September 17	Fly-over showed that sometime after September 13, the dike had been lengthened from two to three miles.
September 26	Fly-over revealed large north-south ditch on the eastern edge of the property, possibly 50 feet wide. While the ditch was mostly on non-wetlands, it filled two natural channels of Ash Creek. Corps also observed roads being constructed in the northwest section of the property. These roads blocked several overflow channels of the Pit River.

October 3	The U.S. sued Akers seeking declaratory and injunctive relief, civil penalties and restoration.
October 5	District court granted TRO forbidding Akers from depositing dredged or fill material in waters on his property, except in certain channels with Corps's permission.
October 24	Court orally granted government's motion for preliminary injunction.
October 31	Written TRO entered.
January 14, 1985	Oral arguments on motions for reconsideration and intervention of the California's Cattlemen's Association, Agricultural Council of California, National Cattlemen's Association, and California Farm Bureau ("Cattlemen") on behalf of Akers and the National Audubon Society and National Wildlife Federation ("Audubon") on behalf of the government.
January 15	Court issued written findings of fact, conclusions of law and order reconfirming the earlier oral preliminary injunction. The order prohibited Akers from depositing dredged or fill material into the waters, channels or wetlands previously delineated by the Corps unless he: (1) obtains a permit from the Corps, *or* (2) submits a proposal for dredge or fill activities, which he asserts are not within the Corps' jurisdiction, *and* (a) is informed in writing by the DE that a permit is not necessary; *or* (b) is *not* informed in writing by the DE whether a permit is necessary within 15 days of receipt of his proposal. The

court also ordered that Akers must comply in good faith with Corps cease and desist orders regarding dredge and fill activities on his property.

January 31 — Court granted permissive intervention of the Cattlemen and Audubon groups.

This appeal followed. Akers has not applied for a § 404 permit from the Corps.

STANDARD OF REVIEW

A preliminary injunction will be reversed "only if the lower court abused its discretion or based its decision on an erroneous legal, standard or clearly erroneous findings of fact." *Flynt Distributing Co., Inc. v. Harvey,* 734 F.2d 1389, 1394 (9th Cir. 1984). The injunction will be upheld if the court correctly found that the government demonstrated either (1) probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of the hardships tips sharply in its favor. *Goldie's Bookstore, Inc. v. Superior Court,* 739 F.2d 466, 470 (9th Cir.1984). These are not separate tests, but rather, "extremes of a single continuum." *Benda v. Grand Lodge of the International Association of Machinists & Aerospace Workers,* 584 F.2d 308, 315 (9th Cir.1978), *cert. dismissed,* 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979).

STATUTORY FRAMEWORK

The Act aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1982). "This purpose is to be achieved by compliance with the Act, including compliance

with the permit requirements." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315, 102 S.Ct. 1798, 1804, 72 L.Ed.2d 91 (1982) (footnote omitted).

The Act prohibits the discharge of dredged or fill materials into "navigable waters"—defined as "waters of the United States"—unless authorized by a permit issued by the Corps pursuant to § 404. *See generally* 33 U.S.C. §§ 1311, 1344 (1982). "Waters of the United States" is broken down into seven categories, including wetlands. *See* 33 C.F.R. § 323.2(a) (1985).

Recently, a unanimous Supreme Court upheld the Corps's wetlands definition[2] in *United States v. Riverside Bayview Homes, Inc.*, — U.S. —, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). The lands in question are wetlands under the Corps's definition; hence, the Corps had authority, absent an applicable exception, to require Akers to obtain a permit before engaging in dredge and fill activities.

Limited exemptions from the permit requirement are found in Section 1344(f), which provides in pertinent part:

> (f) *Non-prohibited discharge of dredged or fill material* (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

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2. Under the Corps's definition, "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. 33 C.F.R. § 323.2(c) (1985). While the Court construed the 1977 definition, it noted that the 1982 definition, quoted above, is "substantively identical." *United States v. Riverside Bayview Homes, Inc.*, — U.S. —, 106 S.Ct. 455, 458, 88 L. Ed. 2d 419 (1985).

> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
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> • • •
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
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> • • •
>
> (E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;
>
> • • •
>
> is not prohibited by or otherwise subject to regulation under this section ....
>
> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Akers' activities must be analyzed in light of the Act's purposes and the intended scope of its exemptions. The Fifth and Seventh Circuits have construed the § 1344(f)(1)

exemptions narrowly. *See United States v. Huebner*, 752 F.2d 1235, 1240-41 (7th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 62, 88 L.Ed.2d 50 (1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925 n. 44 (5th Cir. 1983).

This construction is consistent with the legislative history. Senator Muskie described the exemptions during Senate debate:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

3 *Legislative History of the Clean Water Act of 1977* ("Leg.Hist.") at 474 (Senate Debate, Dec. 15, 1977). As the legislation's primary sponsor, his remarks are entitled to substantial weight. *See Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S.Ct. 2295, 2304, 49 L.Ed.2d 49 (1976); *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1243 & n. 48 (D.C.Cir.1980).

To be exempt from the permit requirements, one must demonstrate that proposed activities both *satisfy* the requirements of § (f)(1) and *avoid* the exception to the exemptions (referred to as the "recapture" provision) of § (f)(2). *See Avoyelles*, 715 F.2d at 926 ((f)(2) takes away some of the exemptions provided in (f)(1)). Akers must establish that his activities are exempt.

ANALYSIS

(1) *The "Normal Farming" Exemption: § 1344(f)(1)(A)*

[1] The court rejected this exemption because the wetlands portion of Akers' farm "has never been subjected to any established upland farming operation," relying on 33 C.F.R. § 323.4(a)(1)(ii) (1985). That regulation provides in pertinent part:

> To fall under this exemption, the activities . . . must be part of an established (i.e., on-going) farming silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations . . . .

Akers bases his entitlement to the exemption on the fact that all of his land, including the wetlands, has been farmed since 1897. He contends that discing and seeding have been part of the farming operation traditionally undertaken on his land.

He ignores the consequences of the new projects, however. We cannot view Akers' plowing, discing and seeding in isolation. The record amply supports the court's finding that upland crop production has not occurred on these wetlands on a regular basis. Upland farming represents a new operation in the wetlands.

Moreover, Akers argued below that unless he were allowed to complete the work he had started, the effect of

which is to drain the wetlands, he would be unable to engage in the farming activities he had planned. By his own admission, his activities require substantial hydrological alteration to Big Swamp, and run afoul of the regulations.

At oral argument, counsel for the government advocated a position of complete authority to prohibit *all* changes in wetland use which involve discharges of pollutants without prior Corps approval. Discing of soil is a point source of pollutants, according to the Corps.

Responding to our inquiries, government counsel asserted that the Corps would require Akers, and other farmers like him, to obtain a § 404 permit before switching from one *type* of wetland crop to another, if the new crop had not been farmed previously. For example, if Akers desired to plant wild rice, a wetland crop, the Corps would require a permit since rice has not been farmed in Big Swamp in the past.

Although we affirm the injunction as a reasonable response to the peculiar facts before us, we do not endorse the government's authoritative position. We do not believe that Congress intended to place the burden of Corps permit regulation on farmers who desire merely to change from one wetland crop to another.

(2) *The "Irrigation" Exemption:* § 1344(f)(1)(C)

The court rejected Akers' attempt to characterize the three-mile long dike bisecting the wetlands as an exempt irrigation facility. He argues that non-exempt dikes hold water on their lowland sides while exempt structures, such as his dike, hold water on their upland sides.

[2] It is irrelevant how he characterizes the dike. Provided the structure has the effect of keeping water from the southern wetlands, its construction requires a permit. *See Huebner*, 752 F.2d at 1242. The regulation defining "minor drainage," as that term is used in the "normal farming" exemption, supports the government's position:

> Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

33 C.F.R. § 323.4(a)(1)(iii)(C)(2) (1985).

Akers also argues that the dike is physically connected and functionally related to an irrigation ditch and, therefore, is exempt under 33 C.F.R. § 323.4(a)(3) (1985):

> Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

The court concluded that the dike was not one of the types of structures specified in the regulation and was not subsidiary to an irrigation ditch. Akers has not demonstrated that these factual findings are clearly erroneous.[3]

(3) *The State Water Rights Proviso:* 33 U.S.C. § 1251(g)

Akers asserts that the court construed 33 U.S.C. § 1251(g) (1982) (also known as the "Wallop Amendment") too narrowly by rendering his state-allocated water rights "virtually meaningless." He urges us to apply the irrigation exemption "so as to not impair or abrogate state allocated water rights."

Section 1251(g) provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

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3. Akers also contends that the court ignored the fact that flood flows caused a breach in the dike and that he intended to place culverts in it. The court rejected these developments as irrelevant. It properly focused on the probable consequences of what had been completed to the time of the hearing on the motion for preliminary injunction.

Akers attacks the "ambiguous" references to legislative history relied on by the district court when it refused to apply § 1251(g). Senator Wallop, who sponsored the amendment, described its purpose during Senate debate:

> The requirements of section 402 and 404 permits may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations. This amendment is an attempt to recognize the historic allocation rights contained in State constitutions. It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes. It does not interfere with the legitimate purposes for which the act was designed.

3 Leg.Hist. 532 (Senate Debate, Dec. 15, 1977).

[3] As intervenor Audubon points out, any incidental effect on Akers' rights to state-allocated water from the Pit River is justified because protection of Big Swamp is the type of legitimate purpose for which the Act was intended.

In *Riverside Irrigation District v. Andrews,* 758 F.2d 508, 513 (10th Cir.1985), the Tenth Circuit construed the Wallop Amendment as an indication

> 'that Congress did not want to interfere any more than necessary with state water management.' *National Wildlife Federation v. Gorsuch,* 693 F.2d 156, 178 (D.C.Cir.1982). A fair reading of the statute as a whole makes clear that, where both the state's interest

> in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process.

Akers staunchly has resisted the permit process. The injunction properly compels him to participate in it.

(4) *The "Roadbuilding" Exemption:* § 1344(f)(1)(E)

[4] Akers disagrees with the court's findings that he constructed a road across overflow channels of the Pit River and failed to comply with best management practices. Rather than challenging these findings as clearly erroneous, he asserts that the injunction is overbroad. He contends that instead of enjoining all roadbuilding, the appropriate remedy "was simply to notify him as to what actions were necessary to bring the road into conformity with best management practices, and require compliance therewith in future activities." We disagree.

The roadbuilding regulations set forth in 33 C.F.R. § 323.4(a)(6) (1985) describe with sufficient clarity what Akers had to do to comply with § 1344(f)(1)(E). As explained in the overbreadth section below, the court properly considered Akers' misunderstanding and disregard of the Act in fashioning appropriate relief.

(5) *The "Recapture" Provision:* § 1344(f)(2)

Judge Ramirez concluded that Akers was unlikely to avoid the recapture provision even if he established an applicable exemption. Over Akers' argument that upland crops *could* have been grown in the wetlands, the court wrote:

> The proper inquiry is not what could have been done but what *was* done in the past and its relationship to what Mr. Akers is attempting to do now. Furthermore, Mr. Aker's [sic] argument ignores the question of whether there will be a change in Big Swamp from wetlands (i.e., waters of the United States) to dry land (no longer waters of the United States). Whether or not there have been isolated incidents of attempted farming of upland crops in the swamp during dryer periods, there is little doubt that the area is still a wetland within the meaning of the Clean Water Act. Mr. Akers' activities taken as a whole appear to this Court to be incidental to an effort to convert the area so that it may be farmed in a way which is inconsistent with its remaining a wetland.

United States v. Akers, No. CIV-84-1276 RAR, Conclusion of Law XIV (E.D.Cal. Jan. 15, 1985). The court did not abuse its discretion in reaching this conclusion.

Additionally, Akers asserts that "use" denotes a major type of use, e.g., farming, silviculture or ranching. Because the land has been used for farming since 1897, he claims there is no major change of use within the meaning of § (f)(2).

He attempts to distinguish *Huebner* and *Avoyelles,* where the recapture provision was applied. He asserts that those cases involved major changes *to* agricultural use, whereas his actions represent "a change within the farming use." However, he cannot escape the impact of

these opinions, which classify as non-exempt those activities which change a wetland's hydrological regime. *See Huebner*, 752 F.2d at 1242; *Avoyelles*, 715 F.2d at 926.[4]

While the exemptions and regulations do not distinguish major and minor changes, the intent of Congress in enacting the Act was to prevent conversion of wetlands to dry lands. For example, Representative Harsha, a member of the conference committee, stated during House debate:

> To assure that the extent of these exempted activities will not be misconstrued, . . . (f)(2) provide[s] common sense limitations to protect the chemical, biological, and physical integrity of the Nation's waters. While it is understood that some of these activities may necessarily result in incidental filling and insignificant harm to aquatic resources, the exemptions do not apply to discharges that convert more extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

3 Leg.Hist. 420 (House Debate, Dec. 15, 1977).

It is thus the substantiality of the impact on the wetland that must be considered in evaluating the reach of § (f)(2). *Cf. Huebner*, 752 F.2d at 1242 (district court properly considered results of dredging as it affected surrounding wetlands). The court's findings on wetland conversion, not clearly erroneous, establish:

> It appears likely that if this work is allowed to remain in place, or allowed to be expanded, an extensive area

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4. *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 646-47 (5th Cir.1983), relied on by appellant, is distinguishable because no change in wetland hydrological regime was proposed. "The wetlands involved here will not be converted as in *Avoyelles*," wrote that court. *Id.* at 647.

> of the Big Swamp wetlands will be converted to non-wetland, thereby significantly reducing the reach of Big Swamp. In addition, the flow and circulation in Ash Creek and the overflow channels of the Pit River may be impaired. Furthermore, many highly significant aquatic functions now performed by the Big Swamp wetlands area will be lost or impaired.

United States v. Akers, Finding of Fact X.

[5] Giving the recapture provision the appropriate common sense reading, it appears that Akers' activities are not exempt from permit requirements due to the likely drying effect. As discussed earlier, this is not to say that he could not change from one wetland crop to another without running afoul of the recapture provision.

(6) *Is the Injunction Overbroad?*

Finally, he argues that the injunction is overbroad because it requires Corps approval for all his dredge and fill activities, including those clearly exempt. The government responds by stating that the conditions are necessary to preserve the *status quo*. The government stresses the non-onerous nature of this injunction, considering the requirement that the Corps respond to a permit application within 15 days.

[6] The district court has considerable discretion to fashion appropriate injunctive relief, particularly where the public interest is involved. *See Virginian Railway Co. v. System Federation No. 40, etc.*, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789 (1937); *State of California v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1324 (9th Cir.) (district court has greater power to fashion equitable relief in defense of the public interest than it has when only private interests are involved), *amended*, 775 F.2d 998

(9th Cir.1985). The Supreme Court has recognized that the Act gives the district court discretion "to order that relief it considers necessary to secure prompt compliance with the Act." *Weinberger v. Romero-Barcelo,* 456 U.S. at 320, 102 S.Ct. at 1807.

In enjoining the filling of wetlands without a permit, courts have noted that the public interest requires strict enforcement of the Act to effectuate its purpose of protecting sensitive aquatic environments. *See United States v. Ciampitti,* 583 F.Supp. 483, 499 (D.N.J.1984); *United States v. Lofgren,* 13 Envtl.L.Rep. (Envtl.L.Inst.) 20,164 at 20,166 (E.D. Mich. 1982) (presumption in favor of preliminary injunction in light of Act's objectives which include maintaining Corps's regulatory scheme) (discussed in W. Want, *Federal Wetlands Laws The Cases and the Problems,* 8 Harv.Envtl.L.Rev. 1, 52 (1984)).

[7] Judge Ramirez did not abuse his discretion in issuing this injunction. He considered extensive testimony regarding past and present uses of Big Swamp, ecological disruption caused by the ongoing and proposed activities, Akers' avoidance of the Corps's permit process, harm incurred by Akers, and the legislative history of the exemptions. The findings and conclusions supporting the injunction are comprehensive and reflect a well-balanced consideration of the competing interests.

CONCLUSION

Akers has failed to demonstrate that the injunction was based on erroneous legal standards or clearly erroneous findings of fact. Nor does he demonstrate that Judge Ramirez abused his discretion.

We are mindful of the plight of today's farmers. So was Congress when it enacted the wetlands legislation at issue here. It did not intend to prohibit all changes of wetlands, however minor, without prior Corps approval.

The changes proposed by Akers are far from minor, however. They contemplate a major conversion from wetlands to dry lands, thereby necessitating a Corps permit. Judicial review of Corps permit approval or denial provides the necessary check against arbitrary government action. We assume that the Corps will not act arbitrarily when it rules on Akers' future permit applications.

This litigation resulted from an inability to work cooperatively. Both parties bear some fault for the breakdown in communications. Reasonableness and cooperation are indicated. The preliminary injunction is AFFIRMED.[5]

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5. Intervenor Audubon's request for attorney's fees on appeal is denied. Counsel has not identified any basis for such an award, and we find none. The motion for intervention pursuant to 33 U.S.C. § 1365, where fees are provided, was denied. Instead, Judge Ramirez granted permissive intervention under Fed.R.Civ. P 24(b).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO. CIV.S-84-1276 RAR

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT W. AKERS,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW;
ORDER GRANTING
PRELIMINARY INJUNCTION

(Filed January 15, 1985)

The motion of plaintiff, UNITED STATES OF AMERICA, for a preliminary injunction came on regularly for hearing before the undersigned on October 24, 1984. John Wittenborn, Special Assistant United States Attorney, and Geoffrey Worstell, Esq., of the United States Army Corps of Engineers, appeared on behalf of plaintiff, UNITED STATES OF AMERICA. Lanny T. Winberry, Esq., appeared on behalf of defendant, ROBERT W. AKERS. Having considered the voluminous pleadings, declarations and exhibits filed in support of and in opposition to the motion, the arguments of respective counsel, the proposed findings of fact and conclusions of law, as well as the objections and counter-proposed findings of fact and conclusions of law, the Court now issues the following Findings

of Fact and Conclusions of Law and Order Granting Preliminary Injunction pursuant to Rule 52 and Rule 65, Federal Rules of Civil Procedure.

FINDINGS OF FACT

The evidence before the Court shows that Mr. Akers is the owner of certain real property he acquired in the early part of 1984, consisting of approximately 9,600 acres located partly in Modoc County and partly in Lassen County, California. The Army Corps of Engineers has determined that between one-fourth and one-third of the acreage, to wit, 2,889 acres known locally as the Big Swamp, is wetlands acreage subject to Corps regulation under the Clean Water Act, 22 U.S.C. § 1251, *et seq.* The District Engineer has also found that the primary agricultural activity in this area has been the haying of native vegetation.

II

The present lawsuit does not represent the first time that the ongoing controversy between Mr. Akers and the Corps of Engineers has been before this Court. The Court can and does take judicial notice of the case file relating to a prior lawsuit filed by Mr. Akers on May 4, 1984, entitled *Akers v. United States, et al.*, Civ.S-84-0598 RAR. The prior lawsuit arose after Mr. Akers developed a farming plan for his property which, in effect, provided for the leveling and filling of the Big Swamp area and diversion of the waters which normally feed it. The Corps of Engineers advised Mr. Akers that he needed a permit for the proposed work, pursuant to § 404 of the Clean Water Act, 33 U.S.C. § 1244.

III

Mr. Akers rejected the Corps' position and filed his lawsuit, in which he sought injunctive relief to preclude the Corps from exercising regulatory jurisdiction over his land or project. After a full hearing on May 15, 1984, this Court denied Mr. Akers' motion for a preliminary injunction. The Court determined that Mr. Akers had established no likelihood of success on the merits. It also found that he had failed to demonstrate a possibility or probability of irreparable harm, as opposed to monetary injury, and had likewise failed to establish a balance of hardships tipping sharply in his favor and/or serious questions for litigation. Thereafter, Mr. Akers dismissed his lawsuit voluntarily.

IV

Prior to the volntary dismissal of Akers' suit, the Corps had entered into a contract with the U.S. Army Corps of Engineers Waterways Experiment Station (WES) for an extensive study and determination of the extent and boundaries of the naturally occurring wetlands on the Akers' property, and for an investigation and report on the nature and extent of past agricultural practices on the land. On August 30, 1984, Col. Arthur Williams, District Engineer, Sacramento District, notified Mr. Akers by letter that he had determined that the land included 2,889 acres of wetlands subject to regulation under the Clean Water Act. He also notified Mr. Akers that the proposed farming plan was not exempt from the permit requirements of the Clean Water Act on the basis of the historical farming practices.

V

The wetland determination made by WES and adopted by Col. Williams was based upon an extensive analysis of vegetation, hydrology and soils and resulted from the study of maps, photographs and nine days of actual on-site investigation. Indeed, Dana Sanders states in his declaration that the wetland report of the Waterways Experiment Station (WES) was based on more technical data than is available in more than 99 percent of all wetland determinations ever made by the Corps of Engineers. Furthermore, the defendant himself conceded for purposes of the preliminary injunction hearing only that wetlands regulated by the Corps under the Clean Water Act do exist on his property.

VI

During the course of its investigation of Mr. Akers' activities and its assessments of his future plans, the Corps consulted with the United States Environmental Protection Agency (EPA) concerning the application of § 404(f) of the Clean Water Act. EPA concurred in the Corps' conclusion that the proposed dredging and construction work on Mr. Akers' property was not exempt from § 404 permit requirements.

VII

In late July, the Corps issued a cease and desist order to stop Mr. Akers from building a dike across the western portion of the wetland. Relying on Mr. Akers' attorney's representation that Mr. Akers was merely reconstructing an existing dike, the Corps withdrew its cease

and desist order. In September 1984, the Corps investigated reports that earth-moving activities were being conducted on Mr. Akers' property in Big Swamp. The Corps' aerial inspections confirmed the on-going construction of an earthen dike, running east-west the length of the wetlands, dividing them roughly in half, as well as other activities, as described more fully below. On September 13, 1984, the Corps issued a cease and desist order to Mr. Akers. The cease and desist order did not mention channels of the Pit River. Nevertheless, Mr. Akers continued to fill in channels of Ash Creek on the east side of his land, apparently based upon his own interpretations of the exemptions to the Clean Water Act.

VIII

There is persuasive evidence that Mr. Akers or his agents have recently engaged in the following earth-moving activities in Big Swamp, to wit: (1) the construction of an east-west dike, now approximately three miles long, which bisects the wetland; (2) the leveling of portions of the wetland area south of the east-west dike, including the filling of certain Ash Creek channels by use of discing equipment; (3) construction of a road across the northwest portion of his property which blocks several overflow channels of the Pit River; and (4) construction of a large ditch and the filling of several Ash Creek channels on the east side of the property. Heavy earth-moving equipment was used to disc and scrape wetland soil from wide swathes on either side of the three mile dike. The soil was then used to construct the three mile dike. Various sections of the southern wetlands were disced with farm equipment. Prior to the discing, the areas were ripped with a chisel plow (or "ripper") which was used

to slice through the soil so that the discing would more effectively pulverize the soil.

IX

The road in the northwest portion of the property has not been culverted, bridged or otherwise designed so as to prevent restriction of flood flows; in fact, it closes overflow channels of the Pit River. The three mile east-west dike and the dikes and ditches running north to south at either end of the three mile dike may, if not broken or dismantled, prevent the natural flow of water to the southern wetlands, causing them to dry up.

X

It appears likely that if this work is allowed to remain in place, or allowed to be expanded, an extensive area of the Big Swamp wetlands will be converted to non-wetland, thereby significantly reducing the reach of Big Swamp. In addition, the flow and circulation in Ash Creek and the overflow channels of the Pit River may be impaired. Furthermore, many highly significant aquatic functions now performed by the Big Swamp wetlands area will be lost or impaired.

XI

Mr. Akers does not have, and has not applied for, a § 404 Clean Water Act permit from the Corps of Engineers for any work on his property.

XII

The government has submitted evidence to establish that the Big Swamp is considered an important waterfowl

wintering area and that it attracts significant numbers of waterfowl in the spring and summer months for nesting and staging activities. Bald eagles and peregrine falcons, both federally listed endangered species, are known to occur in the area, as are golden eagles, which are federally listed as rare species. Cackling geese, whose numbers in California have dwindled seriously in recent years, use the Big Swamp as a staging area in the spring. More common waterfowl species also use and inhabit the Big Swamp in large numbers.

XIII

The defendant asks this Court to look at each of his earth-moving activities individually, rather than to scrutinize the overall cumulative impact of his activities. But this Court does not agree with either the proposed methodology or the conclusion to which the defendant contends it should lead. Moreover, although Mr. Akers had contended that his recent work is only intended to be an intensification of his past farming activities, experts and others who have witnessed his work and assessed its effects, have persuaded this Court that the work will subject his property to new uses potentially detrimental to the Waters of the United States.

XIV

This Court finds that Mr. Akers has either misunderstood or callously disregarded the potential environmental consequences of his activities. The evidence supports an inference that Mr. Akers' activities, if not enjoined, will have the effect of splitting the Big Swamp into northern

and southern halves, with the potential eventual effect of drying up the southern portion. Unless Mr. Akers has a different plan not disclosed to this Court, it appears that he intends this effect in order to pursue new and previously untried agricultural activities in the Big Swamp area.

XV

Although the defendant contends vigorously that isolated instances of farming of upland crops has taken place during the past decades in various sectors of his land, he has not persuasively disputed the Corps' contention that the only established farming operation in the wetland portion of his land prior to his recent construction work was the haying of native wetland grasses. The record also supports the Corps' finding that the ongoing irrigation practices on the land consisted of the use of temporary low spreader dams placed annually in various channels on his property to spread water more evenly over the acreage.

XVI

The United States filed suit against Mr. Akers on October 3, 1984, seeking permanent injunctive relief, restoration of the property to its natural condition and civil penalties. The government also sought temporary and preliminary injunctive relief to restrain Mr. Akers from depositing dredged or fill material into the wetlands and channels on his land during the pendency of this lawsuit, alleging that otherwise the wildlife, plant life and hydrological regime in the area would be threatened with irreparable injury.

XVII

The government's application for a temporary restraining order (hereinafter "TRO") was heard and granted on October 6, 1984. Mr. Akers was restrained from discharging dredged or fill material into the waters on his property unless and until he invited the Corps to determine, and the Corps *did* determine, which waters he could work in without a permit. Waters are not subject to Corps regulations if they are not "waters of the *United States" within the meaning of the Clean Water Act.*

XVIII

The United States now seeks a preliminary injunction to extend the application of the prohibitory provisions of the restraining order throughout the pendency of this lawsuit. The Court is persuaded by the government's arguments in reaching its decision to issue the preliminary injunction. The findings now made by this Court regarding plaintiff's preliminary injunction motion necessarily follow closely the findings set forth in the temporary restraining order, since the same standard and facts are involved. Due to the extensive briefing by both sides since the hearing regarding the TRO, however, the Court now has a much clearer and more detailed understanding of the facts underlying this dispute and the manner in which counsel for both sides view and interpret the law. Therefore, the Court now has the opportunity and ability to make these detailed findings of fact and to set forth the following conclusions of law.

CONCLUSIONS OF LAW

I

To establish its right to a preliminary injunction, the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. These are not separate tests, but the outer reaches "of a single continuum." *Los Angeles Memorial Coliseum Com's v. National Football League,* 634 F.2d 1197 (9th Cir. 1980).

II

The plaintiff has established a strong likelihood of success on the merits of its claims under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*

III

The objective of the Clean Water Act is to restore and maintain the physical, chemical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a).

IV

Subject to certain exemptions, §§ 301 and 404 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1344, prohibit the discharge of dredged or fill material from point sources into the waters of the United States without a permit from the Corps of Engineers. By defining the term "navigable waters" in the Clean Water Act to mean "the Waters of

the United States, including the territorial seas," 33 U.S.C. § 1362(7), Congress intended to assert federal jurisdiction over the nation's water "to the maximum extent permissible under the Commerce Clause of the Constitution." *Natural Resources Defense Council v. Callaway,* 392 F.Supp. 685 (D.D.C. 1975); *Leslie Salt Co. v. Froehlke,* 578 F.2d 742, 754-756 (9th Cir. 1978); *Utah v. Marsh,* 740 F.2d 799, 802-804 (10th Cir. 1984); *Avoyelles Sportmen's League v. Marsh,* 715 F.2d 897, 914-916 (5th Cir. 1983); *United States v. Byrd,* 609 F.2d 1204, 1209-1211 (7th Cir. 1978). The term specifically includes adjacent wetlands. 33 C.F.R. § 323.2. *Avoyelles, supra; Byrd, supra.* This Court concludes that plaintiff has established a strong likelihood that a substantial portion of the property in question constitutes waters of the United States subject to the Clean Water Act.

V

The construction of the dikes, road, ditches, and channel fills, and possibly some of the discing (to the extent it may level that land so as to fill channels or convert wetlands to uplands) involve the discharge of dredged or fill material. The heavy equipment used to move and deposit the earth are point sources. *Avoyelles Sportman's League v. Marsh, supra.*

VI

The defendant contends that his recent activities fall within any of several exemptions to the permit requirement set forth in § 404(f)(1) of the Clean Water Act, 33 U.S.C. § 1344(f). Mr. Akers bears the burden of establishing that his activities are all exempt. *United States v. Frezzo Bros., Inc.,* 546 F.Supp. 713 (E.D. Penn. 1980),

appeal after remand, 703 F.2d 62 (3rd Cir. 1983). The general rule requires the one claiming the benefits of an exception to the prohibition of a statute to establish the applicability of the statutory exception. *U.S. First City National Bank of Houston,* 386 U.S. 361, 366, 87 S.Ct. 1088, 1092 (1967). The Court finds a strong likelihood that Mr. Akers will not be able to do so.

VII

Section 404(f)(1) states that:

> Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material [from activities specified in (A) through (F)] is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this Act (except for effluent standards or prohibitions under Section 307).

The specific exemptions follow. But the 404(f)(1) exemptions are limited by § 404(f)(2), commonly referred to as the "recapture provision." which provides:

> Any discharge of dredged or fill material into the navigable waters, incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Thus, in order to be exempt from regulation, a discharge must not only fall within § 404(f)(1), but must also escape recapture under § 404(f)(2).

VIII

The legislative history of the 1977 Amendments to the Clean Water Act evidences a strong Congressional intent

to limit the scope of the § 404(f)(1) exemptions. As Senator Muskie, sponsor of the legislation explained, "New subsection 404(f) provides that Federal permits will not be required for those *narrowly defined activities that cause little or no adverse effects either individually or cumulatively.*" 3 *Leg. Hist.* 474 (emphasis added). *See also* statements by Rep. Harsha, *id.* at 420, and Senator Wallop, *id.* at 530. The numerous statements in the legislative history concerning what § 404 does *not* exempt are also telling. For example, Senator Muskie explained, "[T]he exemptions do not apply to discharges that convert extensive areas of water to dry land or impede circulation or reduce the reach or size of the water body." 3 *Leg. Hist.* 474; *see also* statement of Senator Baker, *id.* at 523. As Senator Stafford stated, "[P]ermits will continue to be required for those farm, forestry, and mining activities that involve the discharge of dredged or fill material that connect [sic—presumably intended to be "convert"] water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees or other fills in wetland or other waters." 3 *Leg. Hist.* 485. *See also,* Senate Report, 4 *Leg. Hist.* 710 (permit review necessary for discharges to convert a hardwood swamp to another use through dikes or drainage channels).

IX

The defendant attempts first and foremost to rely upon the exemption set forth in § 404(f)(1)(A) which applies to the discharge of dredged or fill material:

> from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber,

> and forest products or upland soil and water conservation practices . . .

Defendant contends that because his recent activities are related to his intentions to farm crops, they are exempt as "normal farming" activities.

X

Defendant's contention is patently incorrect. The exemption for "normal farming" applies only to activities which are:

> part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities bringing an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. 33 C.F.R. § 323.4(a)(1)(ii).

The plaintiff has amply demonstrated that the area of the Big Swamp has never been subjected to any established upland farming operation. Accordingly, defendant's proposed farming plans with its extensive diking and ditching is not within the scope of the "normal farming" exemption.

XI

Defendant has failed to show that his dike and road-building activities are either enumerated in § 404(f)(1)(A) or are similar in nature to those listed. Indeed, as the statement of Senator Stafford cited above indicates, dikes

and levees in wetlands are not exempt. *See also,* 33 C.F.R. § 323.4(a)(1)(iii)(C)(2).

XII

The plaintiff has offered ample evidence to prove that the recent work has significantly modified the hydrological regime in the wetlands area, and the defendant himself has consistently argued that unless he is allowed to complete the work he has started, he will be unable to engage in the farming activities he plans. By his own admission, therefore, defendant's proposed work is not part of an "ongoing" or "established" farming practice. Indeed, it appears that major hydrologic modifications will be required for defendant's farming plan to succeed. Consequently, the defendant is unlikely to establish that his activities fall within the exemptions for "normal farming."

XIII

Even if Mr. Aker's activities did fall within the "normal farming" exception of § 404(f)(1)(A), they would remain subject to permit requirements under the exception to the exemption contained in subsection (f)(2). Read together, these two subparagraphs of § 404(f) provide a narrow exemption for agricultural and silvicultural activities that have little or no adverse effect on the nation's waters. *Avoyelles Sportmen's League, Inc. v. Marsh,* 715 F.2d 897, 926 (5th Cir. 1983). It is clear that Mr. Akers' activities are bringing the southern wetlands into a use to which they have not previously been subject, and which is resulting in an impairment of water flow and circulation as well as a reduction of the wetlands' reach.

XIV

Mr. Akers argues that his activities will not bring Big Swamp into a use to which it was not previously subject, on the ground that upland crops *could* have been grown there, whether or not they actually were. This Court declines to adopt such a strained interpretation of the term "subject to" in § 404(f)(2). The proper inquiry is not what could have been done but what *was* done in the past and its relationship to what Mr. Akers is attempting to do now. Furthermore, Mr. Aker's argument ignores the question of whether there will be a change in Big Swamp from wetlands (i.e., waters of the United States) to dry land (no longer waters of the United States). Whether or not there have been isolated incidents of attempted farming of upland crops in the swamp during dryer periods, there is little doubt that the area is still a wetland within the meaning of the Clean Water Act. Mr. Akers' activities taken as a whole appear to this Court to be incidental to an effort to convert the area so that it may be farmed in a way which is inconsistent with its remaining a wetland.

XV

Furthermore, § 404(f)(2) indicates that a permit is necessary even for discharges that are only "incidental to" an activity which is intended to or will foreseeably bring about the destruction of the wetland (or other change in use), where the reach of the waters will be reduced or their flow or circulation impaired. In order to trigger § 404(f)(2), the discharges themselves need not be the sole cause of the change in use or impairment of reach,

flow, or circulation. Therefore, this Court rejects defendant's request that it look at each activity in isolation or assess their impacts individually. While this Court cannot look into the mind of Mr. Akers to discern his full intentions, the reasonably foreseeable consequence of his activities as a whole is the destruction of a significant wetland.

XVI

Accordingly, plaintiff has established a probability of success on its claim that defendant's recent activities are not encompassed within the reach of § 404(f)(1)(A) and, in any event, would fall within the subsection (f)(2) exception to the (f)(1)(A) exception.

XVII

Defendant also argues that his activities are exempt under § 404(f)(1)(C) which provides that a permit is not required for a discharge of dredged or fill material:

> for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches . . . .

The primary problem with defendant's attempt to invoke the irrigation ditch exemption is that his recent activities have not involved the construction of any irrigation ditch in the wetlands. Instead, his major structure is a *dike* approximately three miles in length. Defendant nevertheless contends that his work, including his dike, constitutes "irrigation facilities" within the meaning of 33 C.F.R. § 323.4(a)(3) (1983) which provides in relevant part:

> Discharges associated with irrigation facilities in the waters of the United States are included within the exemption unless the discharges have the effect of

> bringing these waters into a use to which they were not previously subject and the flow or circulation may be impaired or reach reduced of such waters.

Defendant's proposed reading of the language of the regulation is obviously overbroad. The regulation cannot expand the scope of the statutory exemption, and the statute exempts from permit requirements only stock ponds, irrigation ditches, and the maintenance of drainage ditches. Obviously, then, the term "irrigation structures" as used in the interpretive regulation constitutes no more than a shorthand term for the activities set out at greater length in the statute. Moreover, defendant's attempt to argue that a dike can be an "irrigation facility" within the meaning of 33 C.F.R. § 323.4(a)(3) is at direct odds with the language of the interpretive regulation defining "minor drainage" as that term is used in the "normal farming" exemption, § 404(f)(1)(A). That regulation 33 C.F.R. § 323.4(a)(1)(iii)(C)(2) provides in relevant part:

> In addition, minor drainage does not include the construction of any canal, ditch, *dike* or other waterway or structure which drains or otherwise significantly modifies a . . . wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit. [Emphasis added]

Indeed, the text of 33 C.F.R. § 323.4(a)(3) set forth above has just been changed in order to clarify "the types of appurtenant structures to irrigation facilities for which the discharges associated with such structures are exempt from the provisions of these regulations." 49 F.R.

at 39479. The new text of the regulation was published in the Federal Register on October 5, 1984, and it confirms that "discharges associated with major dams and diversion projects and other large-scale facilities which are not subsidiary to irrigation ditches are clearly not included in the exemption." *Id.* The complete new text of 33 C.F.R. § 323.4(a)(3) provides simply:

> Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance [but not construction] of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

Defendant's three mile dike is not one of the types of structures specified in the new regulation and is clearly not subsidiary to any irrigation ditch.

XVIII

Finally, even if defendant's activities otherwise qualified for exemption under the "irrigation ditch" provision, the exemption is further qualified by subsection (f)(2) which, as discussed above, subjects the defendant's activities to permit requirements even if the (f)(1) exemptions apply.

XIX

Defendant also asserts that § 404(f)(1)(E) serves to exempt his road-building activity in the northwest area of his property, but the very text of the exemption belies his claim. Subsection (f)(1)(E) provides in relevant part that no permit is required for the discharge of dredged or fill material:

> for the purpose of construction or maintenance of farm roads . . . where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized . . . .

Defendant has neither claimed nor established that any attempt was made by him to minimize the adverse effects of his road construction and the result of his activity has been to block overflow channels of the Pit River, which feed the wetlands of his property.

XX

These statutory criteria have been translated by regulation into a number of required best management practices (BMP's) which must be complied with for the exemption to apply. 33 C.F.R. § 323.4(a)(6). Among those BMP's is a requirement that roads be culverted, bridged or otherwise designed to prevent restriction of flood flows. The evidence clearly indicates that Akers failed to comply with any such management practices. Accordingly, defendant has not demonstrated that his road is exempt under 404(f)(1)(E).

XXI

Moreover, the road construction exemption, like all the subsection (f)(1) exemptions, is further subject to the (f)(2) exception which requires a permit for defendant's activities for the reasons discussed above.

XXII

Defendant also argues that the Clean Water Act either constitutes an impermissible violation of his state water rights or that the Act automatically exempts activities which can be traced to the exercise of state water rights. This argument, as presented by counsel for defendant in his briefs and at oral argument, is meritless. Clearly, the Clean Water Act itself does not impermissibly violate state water rights. Moreover, any argument that a grant of state water rights somehow prevents the United States from asserting jurisdiction within its constitutional limits is obviously groundless. *See United States v. Ciampitti*, 583 F.Supp. 483, 495-96 (D.N.J. 1984).

XXIII

Nor does the Clean Water Act automatically exempt from regulation any activities which have some bearing on individual exercise of state-allocated water rights. As the legislative history of § 101(g) of the Act makes clear,

> The requirements of section 402 and 404 permits may incidentally affect individual water rights . . . It is not the purpose of this amendment to prohibit those incidental effects . . .
>
> It is designed to protect historic rights from mischievous abrogation by those who would use an act, *designed solely to protect water quality and wetlands,* for other purposes. *It does not interfere with the legitimate purposes for which the act was designed.* [Emphasis added]

Statement of Senator Wallop (sponsor of § 101(g)), 3 *Leg. Hist.* 532.

XXIV

Having determined that the government is likely to prevail on the merits of its claim, the Court turns its attention to the question of resulting injury. There is some authority for the proposition that the government need not even make a showing of irreparable injury in order to qualify for injunctive relief under the Clean Water Act. *See, e.g., United States v. Ciampitti, supra,* 585 F.Supp. at 498, n.12. This Court need not grapple with the issue, however, because the government has clearly made a showing of irreparable injury in this case.

XXV

Wetlands serve a variety of on-going ecological and aesthetic functions, and the Big Swamp wetland is no exception. They are particularly notable for their role in supporting migratory birds and in controlling erosion and protecting downstream water quality. In numerous declarations of hydrological and wetland experts, the United States has established that Mr. Akers' recent earth-moving activities have already, at least temporarily, cut off the southern half of the wetlands on his property from their natural water sources. These recent activities as well as those which Mr. Akers could reasonably be expected to carry out during the pendency of this litigation if not enjoined, have disrupted and/or are likely to continue to disrupt significantly the ecological functions of Big Swamp. Disruption of those functions constitutes an irreparable injury to a valuable public resource. Should Mr. Akers continue his activities, including the leveling of his land through discing, the placement of fill material in channels

and the construction of dikes and other structures, damage to the area will be compounded.

XXVI

Since the Court has determined that the United States is likely to prevail on the merits of its claims and has demonstrated the probability of irreparable injury if the preliminary injunction is denied, it remains only to be considered whether the granting of the injunction will cause a balance of hardships tipping sharply in Mr. Akers' favor. The Court finds that it will not. Mr. Akers claims that the injunction will cause him such financial damage that he "might" lose his property which "could conceivably" result in bankruptcy. Such speculative statements fall far short of a showing of irreparable injury. Furthermore, as this Court observed during the course of Mr. Akers' prior related case, Mr. Akers either knew or should have known when he purchased the property that he might become involved in a regulatory dispute with the Corps of Engineers. His tactics in proceeding with the work without authorization have brought him to his current financial situation. Therefore, any injury is self-inflicted. The Court notes that had Mr. Akers applied for a permit at the conclusion of the prior case, the dispute might well have been resolved by now.

XXVII

To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, or to the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, the same shall be deemed Conclusions of Law or Findings of Fact as the case may be.

Therefore,

IT IS HEREBY ORDERED that Mr. Akers, his agents, employees and all persons under his control and supervision, are restrained from engaging in any and all deposits of dredged or fill material into the waters on his property, including the wetlands previously delineated by the Corps of Engineers, as well as all channels, unless he:

(1) Obtains a permit from the Corps of Engineers; *or*

(2) Submits a proposal for dredge or fill activities, which he asserts are not within the Corps of Engineer's regulatory jurisdiction, *and*

(a) is informed in writing by the District Engineer that a permit is not necessary for the work he proposes; *or*

(b) is *not* informed in writing by the District Engineer whether a permit is necessary for the work he proposes within fifteen (15) days of receipt of his proposal by the District Engineer (including weekends and holidays).

Notwithstanding any provision of this Order, Mr. Akers shall comply in good faith with all lawful cease and desist orders issued to him by the Corps of Engineers with respect to dredge and fill activities on his property.[1]

---

[1]Thus, in the event that Mr. Akers submits a proposal for dredge and fill activities which he asserts are not within the Corps' jurisdiction, to which the Corps does not respond in writing within fifteen (15) days, Mr. Akers may immediately begin work on the activities within his proposal. However, should a subsequent cease and desist order by the Corps of Engineers order him to halt work on these activities, Mr. Akers must comply with this and all other lawful orders of the Corps.

IT IS SO ORDERED.

DATED: January 14, 1985.

/s/ Raul A. Ramirez, Judge
United States District Court

Supreme Court, U.S.
FILED
AUG 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2130

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT W. AKERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in entering a preliminary injunction to prevent petitioner Akers from discharging dredged or fill material into wetlands on his property without a permit issued under Section 404 of the Clean Water Act, 33 U.S.C. (& Supp. II) 1344, where petitioner was undertaking a new operation on the wetlands that would entail a substantial alteration to its hydrological regime.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2130

ROBERT W. AKERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B20) is reported at 785 F.2d 814. The opinion of the district court (Pet. App. C1-C25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1986. The petition for a writ of certiorari was filed on June 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, was enacted in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters." The Act prohibits, inter alia, the discharge of pollutants into "navigable waters," unless the Secretary of

the Army—acting through the Corps of Engineers—issues a permit pursuant to Section 404 of the Act, 33 U.S.C. (& Supp. II) 1344. Under regulations promulgated by the Corps, and not disputed in this case, "navigable waters" includes wetlands adjacent to waters otherwise covered by the Act. See *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985).

Section 404(f) of the Act, 33 U.S.C. 1344(f), provides certain exemptions from the permit obligations of Section 404. Among these exemptions is Subsection (f)(1)(A), which allows discharge without a permit that results "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

This "normal farming" exemption, however, together with the other permit exemptions enumerated in Subsections (f)(1)(B)-(F), are subject to a so-called "recapture provision," Subsection (f)(2). That provision states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Thus, even if a particular activity falls within an exemption listed in Subsection (f)(1), a permit is nevertheless required if the activity is also covered by Subsection (f)(2).

2. In January 1984, Robert W. Akers, one of the petitioners, bought a tract of some 9,600 acres in northern California (Pet. App. B2). Approximately 2,889 acres of this land, known locally as the "Big Swamp," were determined by the Corps of Engineers to be adjacent wetlands

within the meaning of the Corps' regulations (33 C.F.R. 323.2(c); Pet. App. B2, C2). In addition, Ash Creek, a tributary of the Pit River, flows across the property (Pet. App. B2). For purposes of his petition, Mr. Akers does not dispute that this property constitutes wetlands subject to the Corps' permit jurisdiction (Pet. 4; Pet. App. B2 n.1).

Shortly after Mr. Akers bought the land, he "developed a farming plan for his property which, in effect, provided for the leveling and filling of the Big Swamp area and diversion of the waters which normally feed it" (Pet. App. C2). In pursuit of this plan, on July 16, 1984, Mr. Akers built a dike 3,500 feet long, two to three feet high, and six feet wide, in the western portion of the property. When the Corps of Engineers learned of this dike, Mr. Akers initially explained that he was "ditch cleaning." Later he claimed that he was repairing a pre-existing irrigation structure. Pet. App. B3, C4. In late July or early August, the Corps of Engineers determined that a permit was required, and issued a cease and desist order to prevent the completion of the dike. By then, however, the project was finished. The Corps withdrew the order when Mr. Akers assured them that he was simply reconstructing a pre-existing dike. *Id.* at B3-B4, C4-C5.

In September 1984, the Corps learned that Mr. Akers was pursuing major work in the central portion of the wetlands. A Corps aerial survey revealed that a two-mile-long dike had been built through the wetlands, connecting to the dike on the western portion of the property. A grader and tractor were seen along the dike, and wetlands south of the dike had been leveled. In light of these further developments, on September 13, the Corps issued another cease and desist order. Nonetheless, some four days later, a second aerial survey disclosed that sometime between September 13 and September 17 the east-west dike had been extended from two to three miles. Pet. App. B4, C4-C6.

On September 26, 1984, the Corps discovered that Mr. Akers had dug a large ditch on the eastern edge of the property, which filled two channels of Ash Creek. The Corps also observed that Mr. Akers had built roads in the northwest section of the property, which effectively blocked several overflow channels of the Pit River. Pet. App. B4, C5-C6.

3. On October 3, 1984, the United States sued Mr. Akers, seeking declaratory and injunctive relief, civil penalties, and restoration.[1] On October 24, following briefing, the submission of documents, and a hearing, the district court orally granted the government's motion for a preliminary injunction. Subsequently, the district court allowed additional parties to intervene,[2] and entertained motions to reconsider its injunction. Following argument, the district court denied the motions and issued written Findings of Fact and Conclusions of Law and an order (Pet. App. C1-C25).

In its factual findings, the district court determined that Mr. Akers' construction projects, "if not broken or dismantled, [would] prevent the natural flow of water to the southern wetlands, causing them to dry up." If Mr. Akers' works were allowed to remain in place, or expanded, the court continued, "an extensive area of the Big Swamp wetlands will be converted to non-wetland, thereby significantly reducing the reach of Big Swamp." Moreover, the "flow and circulation in Ash Creek and the overflow channels of the Pit River may be impaired," and "many highly

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[1]Mr. Akers had previously sued the government, seeking an injunction and a declaration that the Corps lacked jurisdiction over his property. After his motion for a preliminary injunction was denied, Mr. Akers voluntarily dismissed the lawsuit. Pet. App. B3.

[2]The California Cattlemen's Association, California Farm Bureau, Agricultural Council of California and National Cattlemen's Association intervened in support of Mr. Akers. The National Audubon Society and National Wildlife Federation intervened in support of the United States (Pet. App. B5).

significant aquatic functions now performed by the Big Swamp wetlands area will be lost or impaired." Pet. App. C6. In short, the court determined, "Mr. Akers has either misunderstood or callously disregarded the potential environmental consequences of his activities"; and "if not enjoined, [his actions] will have the effect of splitting the Big Swamp into northern and southern halves, with the potential eventual effect of drying up the southern portion" (*id.* at C7-C8).

The district court next determined, as a conclusion of law, that Mr. Akers was not exempt, under Subsection (f)(1), from the obligation to secure a permit for the work he was doing on the wetlands. In particular, the court rejected petitioner's assertion (Pet. App. C14) that he fell within the exemption for "normal farming" activities, contained in Subsection (f)(1)(A). In so holding, the court applied the Corps' regulation, 33 C.F.R. 323.4(a)(1)(ii), governing the "normal farming" exemption. That regulation provides:

> To fall under this exemption, the activities * * * must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

Applying this regulation, the court found that the Big Swamp had never been part of any established upland farming operation and that Mr. Akers' proposed discharge activities would require major hydrological modifications, all contrary to the definition of "normal farming" in the Corps' regulation. Pet. App. C13-C15.

As an alternative holding, the district court concluded that "[e]ven if Mr. Aker's [*sic*] activities did fall within the 'normal farming' exception of § 404(f)(1)(A), they would remain subject to permit requirements under the exception to the exemption contained in subsection(f)(2)" (Pet. App. C15). Reviewing the record the court found that "Mr. Akers' activities are bringing the southern wetlands into a use to which they have not previously been subject, and which is resulting in an impairment of water flow and circulation as well as a reduction of the wetlands' reach" (*ibid*). "Accordingly," the court determined, "plaintiff has established a probability of success on its claim that defendant's recent activities are not encompassed within the reach of § 404(f)(1)(A) and, in any event, would fall within the subsection (f)(2) exception to the (f)(1)(A) exception" (*id.* at C17).

The district court therefore issued a preliminary injunction (Pet. App. C24) preventing Mr. Akers from discharging dredged or fill materials into the waters on his property until he first obtained a permit from the Corps or received a determination by the Corps (within 15 days of Mr. Akers' application) that a permit was not needed.[3]

4. The court of appeals affirmed (Pet. App. B1-B20), holding that the factual findings made by the district court were "comprehensive and reflect[ed] a well-balanced consideration of the competing interests" (*id.* at B19). With respect to the "normal farming" exemption pressed by petitioner, the court of appeals acknowledged, on the one hand,

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[3]The district court also rejected Mr. Akers' claims that his activities fell within the exemptions for irrigation ditches (Subsection (f)(1)(C)) and farm roads (Subsection (f)(1)(E)) (Pet. App. C17-C20). It further concluded that the application of the Clean Water Act did not abridge Mr. Akers' state water rights (*id.* at C21). Mr. Akers does not renew these claims in support of his petition for certiorari, nor do the intervenors make these claims on his behalf.

that "normal farming" may well include a farmer who "desire[s] merely to change from one wetland crop to another" (*id.* at B11). Agreeing with the district court, however, the court held that petitioner sought to effect much more dramatic changes in the wetlands than simply the rotation of wetland crops (*id.* at B10-B11):

> The record amply supports the [district] court's finding that upland crop production has not occurred on these wetlands on a regular basis. Upland farming represents a new operation in the wetlands.
>
> Moreover, Akers['] * * * activities require substantial hydrological alteration to Big Swamp, and run afoul of the regulations.

The court of appeals also affirmed the district court's alternative holding, concluding that the "recapture" provision, Subsection (f)(2), required petitioner to secure a permit regardless of whether he fit within the "normal farming" exemption in Subsection (f)(1) (Pet. App. B16-B17). The court of appeals noted that Subsection (f)(2) must be construed in light of "the intent of Congress in enacting the [Clean Water] Act [which] was to prevent the conversion of wetlands to dry lands" (*id.* at B17). The Act, to be sure, does not require a permit for each and every alteration in the wetlands; as the court put it, "[i]t is * * * the substantiality of the impact on the wetland that must be considered in evaluating the reach of § (f)(2)" (*ibid.*). Here, the court concluded, the findings of fact of the district court, which were not clearly erroneous, established that petitioner's discharge activities would convert an extensive part of the Big Swamp into non-wetland and measurably impair the flow of water within it (*id.* at B17-B18). In short, while the court was "mindful of the plight of today's farmers," and while "Congress * * * did not intend to prohibit all changes

of wetlands, however minor, without prior Corps approval," still "[t]he changes proposed by Akers are far from minor * * *. They contemplate a major conversion from wetlands to dry lands, thereby necessitating a Corps permit." *Id.* at B20. The court of appeals therefore affirmed the preliminary injuction (*ibid.*).

ARGUMENT

In affirming the grant of a preliminary injunction in this case, the court of appeals first rejected petitioner's claim that he fell within the "normal farming" exemption to the permit obligation, under Subsection (f)(1)(A). Alternatively, the court held that even if petitioner were otherwise exempt, his activities were covered by the recapture provision, Subsection (f)(2). The court's decision is correct and does not conflict with any decision of this Court or of any other circuit. Accordingly, further review is unwarranted.

a. Mr. Akers asserts (Pet. 10-11) that because the wetlands have been "farmed since the turn of the century" and are "not being converted into a housing development, golf course, or shopping center", his activites on the land fall within the ambit of the "normal farming" exemption to the permit requirement. As petitioner construes the exemption, no permit is necessary as long as an owner continues to pursue an activity that can plausibly be called "farming"—regardless of how novel the use of the land is or how dramatically it affects the hydrological regime. The court of appeals correctly rejected this contention.

First, the plain language of Subsection (f)(1)(A) makes clear that not every activity that may conceivably be called "farming" is embraced by the exception. Only "normal" farming is exempted; and even petitioner concedes that his reconstruction work will "intensify" the established farming uses of the property (Pet. 11). Moreover, the Subsection enumerates the kinds of activities that are included as

"normal farming"; among these are such moderate uses of the land as "seeding," "minor drainage," and "harvesting for the production of food." The undisputed evidence in this case established that Mr. Akers' activities "represent[] a new operation in the wetlands * * * the effect of which is to drain the wetlands [and] * * * require substantial hydrological alteration to Big Swamp" (Pet. App. B10-B11). This is a far cry from the kinds of activities enumerated in the statute.[4]

In nevertheless asking this Court to construe the "normal farming" exemption broadly—so that his activities may be covered—petitioner also ignores the familiar principle that "remedial legislation * * * should * * * be given a liberal interpretation [and] for the same reason[,] exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern Ry.* v. *ICC*, 286 U.S. 299, 311-312 (1932). Accord *Israel-British Bank (London) Ltd.* v. *FDIC*, 536 F.2d 509, 513 (2d Cir.), cert. denied, 429 U.S. 978 (1976); *Durovic* v. *Richardson*, 479 F.2d 242, 250 n.6 (7th Cir.), cert. denied, 414 U.S. 944 (1973); *Gault* v. *Commissioner*, 332 F.2d 94, 97 (2d Cir. 1964). Even apart from this principle, however, the court of

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[4]Petitioner contends (Pet. 10) that the activities enumerated in Subsection (f)(1)(A) are simply examples of "normal farming" and are not intended to be exclusive. That is doubtlessly so, but misses the point. While the enumerated activities may not be exclusive, they do reflect the kinds of activities that Congress intended to exempt. As the court of appeals concluded, petitioner's activities on the wetlands, unlike those listed in the statute, require major hydrological alterations in the wetlands and subject the property to farming uses never before applied to the land. Considered in light of the examples listed in the statute, Mr. Akers' activities simply do not fall within the purview of "normal farming." See, *e.g.*, *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 592, 600-601 (1963); *Carlyle Compressor Co.* v. *Occupational Safety & Health Review Comm'n*, 683 F.2d 673, 675 (2d Cir. 1982); *Trinity Services, Inc.* v. *Marshall*, 593 F.2d 1250, 1258 (D.C. Cir. 1978).

appeals correctly construed the "normal farming" exemption (Pet. App. B8-B9), and every other circuit court that has addressed the issue has reached a similar conclusion. See *United States* v. *Huebner*, 752 F.2d 1235, 1240-1241 (7th Cir. 1985) (brackets in original; citation omitted) ("Our review of the legislative history of the agricultural exemptions convinces us that * * * Congress intended that Section 1344(f)(1) exempt from the permit process only 'narrowly defined activities * * * that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body.' "), cert. denied, No. 84-1613 (Oct. 7, 1985); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 925 n.44 (5th Cir. 1983).[5]

Petitioner also overlooks the administrative regulation implementing the "normal farming" exemption, 33 C.F.R. 323.4(a)(1)(ii). That regulation provides:

> To fall under this exemption, the activities * * * must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. * * * Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

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[5]Moreover, the court of appeals' construction of the scope of the permit exemptions accords with the conclusion of this Court in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 319 (1982) (citation omitted), that the Federal Water Pollution Control Act, to which the 1977 Clean Water Act was an amendment, was intended " 'to establish a comprehensive long-range policy for the elimination of water pollution' " and that "[t]he permit system was the key to that policy".

This regulation, promulgated by the agency charged with administering the Section 404 permit program, is entitled to deference (*United States* v. *Riverside Bayview Homes*, No. 84-701 (Dec. 4, 1985), slip op. 9); and petitioners do not suggest that the regulation in any way conflicts with the intent of Congress. Applying this regulation (Pet. App. B10-B11), the court of appeals concluded that petitioner's activities on the wetlands would plainly bring the land into a new use and require substantial "modifications to the hydrological regime". That fact-bound conclusion, not disputed by petitioner, was clearly correct.

Petitioners nevertheless argue (Pet. 13-20) that the legislative history of Subsection (f) confirms that "Congress had every intention to exclude normal farming activities, such as crop rotations, from the domain of the Army Corps of Engineers" and therefore that "the activities of Mr. Akers fall well within the congressional intent." This begs the issue entirely. Obviously, Congress intended, as petitioners suggest, to exempt "normal farming"; that is exactly what Subsection (f)(1)(A) says. The issue, however, is whether by "normal farming" Congress intended to exempt activities such as those pursued by Mr. Akers. The court of appeals, reviewing the applicable legislative history (Pet. App. B9), concluded that Congress did not. That conclusion accords with the decisions in the other circuits, see *Huebner*, 752 F.2d at 1240-1241; *Avoyelles*, 715 F.2d at 926, and does not warrant further consideration by this Court.

b. Mr. Akers also challenges the court of appeals' alternative holding that the recapture provision, Subsection (f)(2), required him to secure a permit, even if he were otherwise covered by the "normal farming" exemption. Petitioner argues, first, that the court of appeals construed the recapture provision too broadly by applying it, so he says, "to any activity that may alter a wetland's hydrological

regime" (Pet. 11). This is a clear misreading of the court's opinion. The court expressly held that the applicability of the recapture provision depends upon "the substantiality of the impact on the wetland" (Pet. App. B17). Indeed, the court stated quite plainly that Congress did not "intend[] to place the burden of Corps permit regulation on farmers who desire merely to change from one wetland crop to another" (*id.* at B11). Petitioners' real objection, therefore, is not to the legal standard used by the court of appeals in applying Subsection (f)(2), but rather to its fact-bound determination that Mr. Akers' activities would have "the effect of * * * drain[ing] the wetlands [and would] * * * require substantial hydrological alteration to Big Swamp" (Pet. App. B10-B11).

Petitioners argue, finally, that Subsection (f)(2) applies only "when a farmer attempts to put previously *unfarmed* land into production by destroying or altering an existing wetland" (Pet. 11 (emphasis in the original)). According to petitioners, the recapture provision does not apply when a wetlands has been used in the past for some type of farming activity and is thereafter used for another type of farming activity—no matter how drastic an alteration in the hydrology is entailed. The court of appeals' survey of the legislative record confirms that petitioners' construction of this provision is mistaken (Pet. App. B17). Moreover, petitioners' contention to the contrary notwithstanding (Pet. 11), the other courts that have considered the recapture provision have construed it in precisely the same way as the court of appeals did in this case; and in the process, these courts rejected arguments virtually indistinguishable from those advanced by petitioners. See *Huebner*, 752 F.2d at 1240-1241; *Avoyelles*, 715 F.2d at 926.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-2130

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NATIONAL CATTLEMEN'S ASSOCIATION,

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v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF TO GOVERNMENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF TO GOVERNMENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On August 26, 1986, the government served its opposition to the petition of Robert Akers and intervenor-defendants for writ of certiorari in this case. In that opposition the government advanced arguments based upon a fundamentally flawed understanding of the congressional intent and plain language behind the agricultural exemptions to the Clean Water Act, 33 U.S.C. § 1344(f). This misunderstanding is not only contrary to the intent of Congress, but also defies common sense.

I

"NORMAL FARMING" AS USED IN THE AGRICULTURAL EXEMPTION MEANS NORMAL FARMING AS THAT TERM IS COMMONLY UNDERSTOOD, AND INCLUDES ALL THE ACTIVITIES ENGAGED IN BY MR. AKERS

In trying to explain away the intent behind the normal farming exemption to the Clean Water Act, 33 U.S.C. § 1344(f)(1), the government attempts to give that term an absurdly narrow construction. It has never been disputed that Mr. Akers intended to grow anything but normal crops, specifically wild rice or upland cereal grains, in any way but a normal and accepted manner. Yet the government denigrates Mr. Akers' plans, and misstates his argument, by stating that "petitioner construes the exemption [to apply to] an activity that can plausibly be called 'farming'—regardless of how novel the use of the land is . . . . " Opposition Brief at 8. There is nothing at all "novel" about Mr. Akers' actual or proposed farming activities. The growing of wild rice and cereal grains has constituted "normal" farming for millennia. Thus whether or not the area had ever been the site of "upland" farming is not particularly relevant to the question of whether the proposed farming activities of Mr. Akers are "normal" farming. Surely wild rice and/or cereal grain farming is normal, and not novel, in the modern era of Twentieth Century farming.

The government next claims that the normal farming exemption should not apply because "even petitioner concedes that his reconstruction work will 'intensify' the established farming use of the property." Opposition Brief at 8. First petitioners are heartened that the government

recognizes that at least some of what Mr. Akers has been attempting to do with his property in "reconstruction," revealing again that the activity is normal and not "novel." Second, this assertion by the government raises a curious question of its own. Since when it is not "normal" for a farmer to intensify a farming operation? Modernization of a farming operation is absolutely essential to any farmer who wishes to stay competitive in today's extremely difficult market. The government would have every farmer who operates on or near wetlands be trapped forever in the early Twentieth Century. This is wrong; farmers must have the ability to compete, and to do this they must have the complete ability to modernize without interference from the Army Corps of Engineers (Corps). This is precisely what Congress intended when it passed the exemption. The government's notion that normal farming does not include intensification or modernization must be rejected.

The government also argues that anything but "moderate uses" fall outside the exemption as do "farming uses never before applied to the land." Opposition Brief at 9, 9 n.4. Neither Congress nor the regulations ever placed a "moderate" limitation on the normal farming exemption. Outside of mining, farming is one of the most intense uses of land possible. To suddenly limit the permissible range of normal farming uses to "moderate uses" is contrary to any commonsense definition of either the word farming or normal. Similarly, there can be found nowhere in the statute, regulations, or congressional debate any reference to the government's notion that "uses never before applied" fall outside the scope of the exemption. Again the government would forever tie farmers to

only those farming methods used only at the present moment, without any ability to modernize, intensify, or alter those uses without first running to the Corps for a permit.[1]

II

THE GOVERNMENT'S CRABBED DEFINITION OF "NORMAL FARMING" IS UNSUPPORTED EITHER BY CONGRESSIONAL INTENT OR LEGAL PRECEDENT

The government contends that because "petitioners do not suggest that the regulation in any way conflicts with the intent of Congress," Opposition Brief at 11, and that because the decision of the court below was "fact-bound," *id.*, the opinion below must be upheld. The basis for this logic is remarkably strained and misleading. While the regulation itself is clearly not a subject of challenge in this case, the legal issues surrounding its interpretation most certainly are.

As explained in the opening petition, the agricultural exemptions were passed by Congress to free farmers from the regulatory morass threatened by the Army Corps of Engineers. *See, e.g.,* Akers' petition at 13-20. While the Senate and House balked at suggestions to remove all wetlands from Corps' jurisdiction, they did pass exemptions that undisputably apply to active ongoing farming

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[1] It should be noted that the government's reference to the permit system as the key to the elimination of "water pollution" is rather misleading in this context. Opposition Brief at 10 n.5. Farming in general, and Mr. Akers' farming in particular, cannot seriously be considered as "pollution." The permit system applies to farming only in the context of the filling in of wetlands, not to the primary thrust of the Federal Water Pollution Control Act, which was to abate water pollution as that term is commonly understood.

operations, and this intent is reflected in the regulations where reference is made to "ongoing" operations. 33 C.F.R. § 323.4(a)(1)(ii) (1985). However, the government's interpretation of those regulations is unsupportable. Nowhere in the statute, regulations, or congressional history can any support be found for the belief that any type of active and ongoing farming operation is not protected by the exemptions. Nor does the so-called "recapture provision," 33 U.S.C. § 1344(f)(2), serve to delete any active and ongoing operation from the exemption. Rather, it applies only to attempts to convert nonfarming uses into farming uses, or vice versa. There is absolutely no legal or historical justification for the government's purported distinction between farming uses of one sort versus those of another. The mere conversion of one crop to another, with whatever irrigation changes and reconstruction that are necessary, is not such a new use for which the recapture provision can be invoked.

All of the cases cited by the government are of no avail to its argument. In *United States v. Huebner,* 752 F.2d 1235, 1240-41 (7th Cir. 1985), *cert. denied,* — U.S. —, 88 L. Ed. 2d 50 (1985), the defendant attempted to convert land that had not been farmed in decades into farmland and to convert inoperable irrigation ponds into dry land. In Akers' case the subject land has been actively and continuously farmed since the turn of the century.[2] The case of *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 926 (5th Cir. 1983), provides even less support to the government's argument. There the

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[2] It should be noted that the record below demonstrates that the property has also been drained at the end of every year to provide for mechanized harvest.

land had never been used for farming and the defendant attempted to clear stands of hardwood wetland forest to make his property suitable for farming.

The government notes with approval that the court below "expressly held that the applicability of the recapture provision depends upon 'the substantiality of the impact on wetland.'" Opposition Brief at 12. But how is this "substantiality" to be determined? Only by running to the Corps for it to make that factual determination. And this is precisely what is wrong with the government's interpretation of the agricultural exemption and its limitation of the term "normal farming" to something narrower than any rational or logical meaning. Congress intended to free farmers from the specter of bureaucratic interference with their day-to-day decision making processes. Yet the government argues that the Army Corps of Engineers must become every farmer's comanager to determine what can and cannot be done on a farm, with or without a permit, whenever some wet land may be "substantially" affected.[3] If the farmer acts without consulting with the government comanager, it is at the farmer's peril because the penalties under the Clean Water Act can be severe. Surely this is an unsupportable state of affairs

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[3] The government asserts that the court's decision protects rotations among wetland crops from excessive regulation. Opposition Brief at 7. Yet if a farmer wishes to convert from wetland wild hay cultivation to wetland wild rice cultivation, and the "hydrological regime" were to be affected, which is not an impossible scenario under certain circumstances, then the Corps could very well have permit jurisdiction under the government's reading of the decision. And even by the government's argument a crop rotation from meadow hay to a cereal grain most certainly would invoke the direct regulation by the Corps.

and one clearly not envisioned by Congress and not supported by any existing case law.

—o—

CONCLUSION

For the foregoing reasons this Court should grant Akers' Petition for Writ of Certiorari.

DATED: September, 1986.

Respectfully submitted,

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(3)

No. 85-2130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

**ROBERT W. AKERS;
CALIFORNIA CATTLEMEN'S ASSOCIATION;
CALIFORNIA FARM BUREAU FEDERATION, and
NATIONAL CATTLEMEN'S ASSOCIATION**

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION AND BRIEF AMICUS CURIAE OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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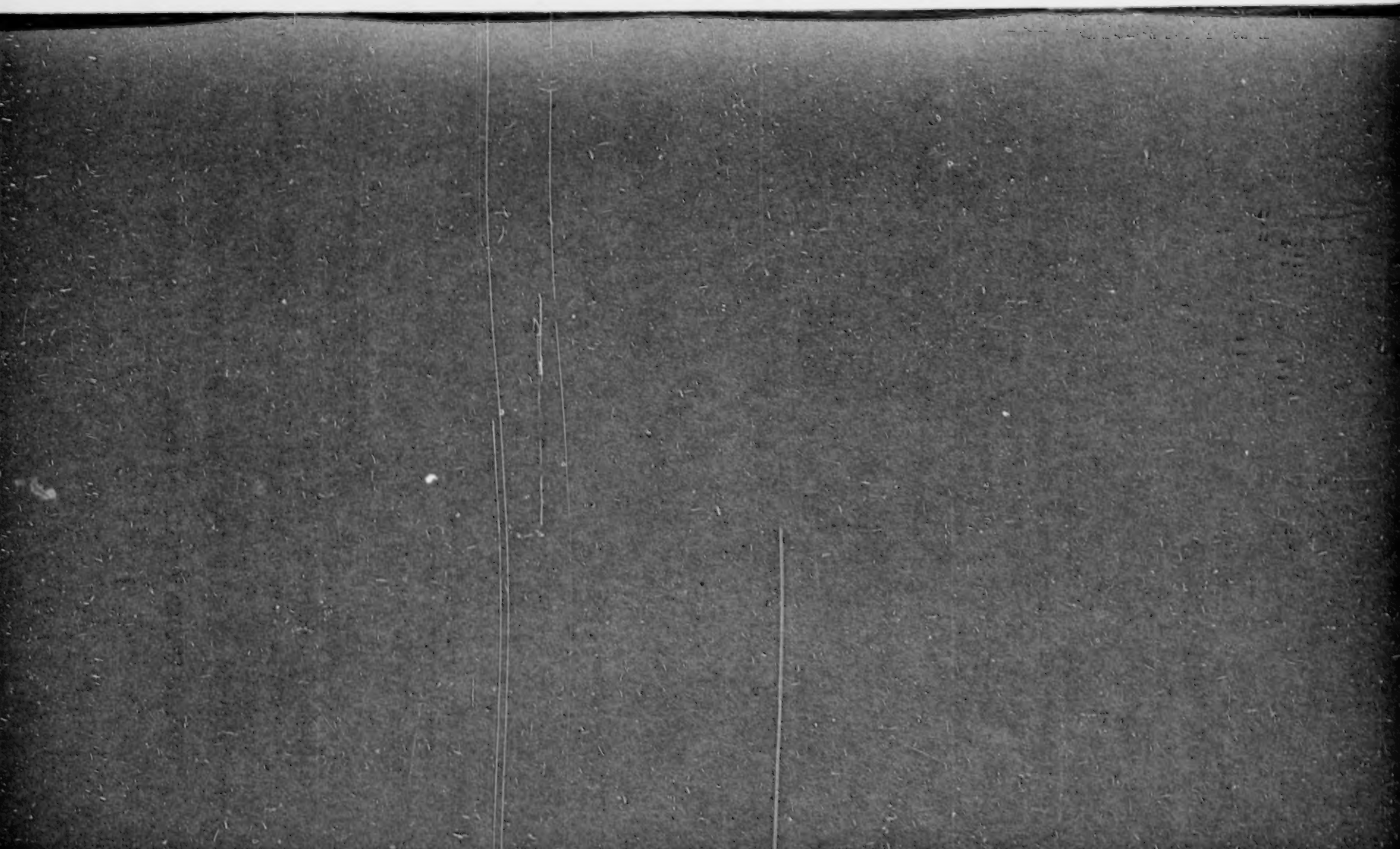

MOTION FOR LEAVE TO FILE AMICUS CURIAE

The American Farm Bureau Federation moves for leave to file a brief *amicus curiae* in the above case, pursuant to Supreme Court Rule 42. Consent has been requested of all parties, and has been obtained from Petitioners. No response to our request has yet been received from either the United States or intervenor-appellees.

The American Farm Bureau Federation of 225 Touhy Avenue, Park Ridge, Illinois is a general farm organization organized in 1919 under the "General Not-For-Profit Corporation Act" of the State of Illinois. It has as its purposes the protection, promotion and representation of the economic, social, business and educational interests of farmers and ranchers of the United States. The largest general farm organization in the world, it has member State Farm Bureaus in 49 states and Puerto Rico, representing the interests of more than 3 million member families.

Our interest in this case is the protection and preservation of the rights of farmers to make farm management decisions on their private lands without undue government interference. With today's depressed agricultural climate, it is especially important that farmers have the flexibility to make basic management decisions, such as what crops to plant, in response to market demands on the basis of what they determine will make best use of their private land and what will best support their families.

The decision below, involving interpretation of the authority of the Corps of Engineers under Section 404 of the Clean Water Act, seriously impairs this necessary freedom and flexibility with regard to crops grown on wetland areas. The decision allows the Corps to review all management decisions affecting wetlands crops, and gives the Corps authority to require a 404 permit where such practices could affect the "hydrological regime."

In 1977, Congress enacted provisions exempting "normal agricultural activities" from the Section 404 permitting

requirements. The decision below effectively negates this exemption in areas of wetland cropping, and could impose a substantial hardship on producers of such wetlands crops as rice, wild rice and cranberries.

In view of the issues and ramifications in this case, which are broader than the parties would indicate, the American Farm Bureau Federation respectfully requests that it be permitted to file a brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Section 404(f)(1), 33 U.S.C. § 1344(f)(1), provides an exemption from wetland dredge and fill regulation by the Army Corps of Engineers for agricultural activities. Section 404(f)(2), 33 U.S.C. § 1344(f)(2), makes the Section 404(f)(1) exemption inapplicable to certain practices. Does Section 404(f)(2) obviate the agricultural exemption when a farmer wishes to change from a wetland crop to an upland crop, or when a farmer wishes to rotate from one wetland crop to a different wetland crop and that change might alter an area's hydrological regime?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT W. AKERS;
CALIFORNIA CATTLEMEN'S ASSOCIATION;
CALIFORNIA FARM BUREAU FEDERATION, and
NATIONAL CATTLEMEN'S ASSOCIATION
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF AMICUS CURIAE OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation of 225 West Touhy Avenue, Park Ridge, Illinois is a general farm organization organized in 1919 under the "General Not-For-Profit Corporation Act" of the State of Illinois. It has as its purposes the promotion, protection and representation of the business, economic, social and educational interests of farmers and ranchers in the United States. It has member State Farm Bureau organizations in 49 states and Puerto Rico, representing the interests of more than three million member families.

A cornerstone of Farm Bureau philosophy expressed in policy adopted by voting delegates at the 1986 Annual Meeting in Atlanta, Georgia, states: "Property rights are among the human rights essential to the preservation of individual freedom." Our interest in this case is the protection of the right of a farmer or rancher to use his privately owned property in a manner that he determines will make best use of his land while at the same time provide a living for him and his family. Individual determination and flexibility are especially critical in today's depressed agricultural climate as farmers seek to adapt their farming operations in such ways to ensure their survival. All too often farmers have been forced to sit by helplessly as their survival is slowly strangled by excessive government regulation.

Section 404 of the federal Clean Water Act is one of the more restrictive government regulations, because it requires Army Corps of Engineers' approval for many proposed agricultural practices. In 1977, Congress struck a balance by exempting "normal agricultural practices" from Section 404 permit requirements. AFBF has participated in several subsequent cases in which courts have pretended that the agricultural exemption does not even exist. This trend is clearly contrary to the intent of Congress and detrimental to agriculture.

The Ninth Circuit decision below carries this trend one step farther by extending Corps of Engineers jurisdiction to wetland areas already producing crops. "Wetlands agriculture" is an expanding business, including such crops as rice (4.2 million acres nationwide), cranberries (23,820 acres nationwide), wild rice as well as meadow hay. Rice and cranberry operations are very capital intensive ventures, neither of which can afford to pay for more government regulation or risk that management decisions necessary to preserve their operations will be denied.

Every state has land classified as "wetlands," and therefore might potentially support a "wetlands agriculture." The 1982 SCS National Resources Inventory indicates that

there are 76,187,200 acres of "wetlands" throughout the United States (see Table I). The scope and viability of the Section 404 "agricultural exemption" is of nationwide significance and importance to our membership.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 785 F.2d 814 (9th Cir. 1986).

The opinion of the United States District Court for the Eastern District of California is not officially reported, but the court's findings of fact and conclusions of law and order granting preliminary injunction, filed January 15, 1985, are reproduced in Appendix C to petitioners' petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In the case below, *United States* v. *Akers*, 785 F.2d 814 (1986), the Ninth Circuit Court of Appeals found that if a farmer wishes to convert from a wetland crop to an upland crop (Opinion, Petitioners' Appendix Bat 10–11, all references to the Appendix refer to Petitioner's Appendices), or even if he merely wishes to convert from one wetland crop to another wetland crop, and management of the new wetland crop might possibly alter the "hydrologic regime," (Opinion, Appendix B at 11, 16-17), he must first obtain a permit pursuant to Section 404 of the Clear Water Act 33 U.S.C. § 1344.

As a result of this decision, most farming activities involving any change in the ongoing production of a particular wetland crop must first be reviewed and approved by the Army Corps of Engineers. (Even if a determination is made that the proposed activity will not alter the "hydrological regime" and therefore does not require a Section 404 permit, the proposed activity still must undergo COE scrutiny and

approval.) The activity at issue in this case, changing from one wetland crop (meadow hay) to another wetland crop (wild rice) involves a very basic "agricultural practice"—the decision as to which crop to plant. If the Ninth Circuit decision is permitted to stand, the Corps of Engineers will be given an unprecedented control over the course of wetlands agriculture, a result clearly not intended by Section 404.

A. Section 404 of the Clean Water Act Does Not Authorize the Corps of Engineers To Be Involved in the Daily Management Decisions of Farmers

The appellate decision below has accomplished the exact result that Congress sought to avoid in enacting Section 404 of the Federal Water Pollution Control Act of 1972, and the exact result thought to have been once and for all precluded by Section 404's clarifying modifications embodied in the Clean Water Act Amendments of 1977.

The Clean Water Act was designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As one of the means of accomplishing this task the Act prohibits the discharge of dredged or fill materials into "navigable waters"—defined as waters of the United States—unless authorized by a permit issued by the Corps pursuant to Section 404. 33 U.S.C. §§ 1311, 1344. "Waters of the United States" have been interpreted to include "wetlands." 33 C.F.R. § 323.2(a). With this jurisdictional extension the Corps began to promulgate regulations controlling normal day-to-day agricultural activities which were occurring on farmlands that were classified by the Corps as "wetlands."

This created a serious backlash from agriculture which led to the 1977 amendments to Section 404 of the Clean Water Act. Senator Muskie explained the situation well:

> "The corps proceeded to take that section and, by its interpretation, expand it far beyond any intent of the Congress so that it found itself threatening regulation in

areas of the country which the corps had never imagined it had any jurisdiction over.

"We all began to get letters from farmers, foresters, ranchers, from people whose activities in the mind of Congress were not in the slightest bit intended to be affected by 404 when we enacted Section 404." A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Act (Leg. Hist.) Vol. 4 at 948 (Environmental Policy Division of the Congressional Research Service of the Library of Congress (October, 1978)) (Senate debate).

Several amendments to Section 404 were proposed, but of prominence were one supported by Senator Muskie of Maine (S. 1952, Section 49(e)(1)(A), Leg. Hist. at 623) and one sponsored by Senator Bentsen of Texas. Leg. Hist. at 901. Senator Bentsen argued that Section 404 should be limited to activities affecting navigable waters which could be used to transport interstate and foreign commerce thus excluding most farming from Section 404 regulation, the justification being that farming activities were never intended to be included by the 1972 Act in the first place. Senator Bentsen argued on behalf of his amendment:

"I find it offensive that before a small farmer can dig new irrigation ditches he must first write the U.S. Army for permission, complete the necessary Federal forms, and then wait an average of 125 days while his request is shuffled from one bureaucrat's inbox to another. I also find it offensive that a farmer who paid hard-earned money for new land 2 years ago may now be prohibited by the Government from improving that land for agriculturally productive uses, and will not receive a penny in just compensation for his loss of income from his property." Leg. Hist. at 905.

Senator Muskie also found it offensive but opposed Mr. Bentsen's method of curing the Corps' overregulation of farmers. He stated:

> "I think it ought to be clear that no Member of the Senate . . . defends Section 404. The Senator [Bentsen] knows that I vigorously opposed the interpretation of Section 404 which the Corps of Engineers undertook to implement, and the committee undertook in its proposal to meet the objections of Section 404 in one way, and the Senator's amendment seeks to meet it in another way. So the contest is really not between those who defend Section 404 and those who object to it but rather it is a competition between two different methods of dealing with the problems created by the Corps' interpretation of Section 404." Leg. Hist. at 903.

There was no doubt that Congress was seeking to reduce the Corps' interpretation of its Section 404 jurisdiction to manageable limits, and to prevent the Corps from overseeing the day-to-day activities of America's farmers. However, the bill supported by Senator Muskie did not limit Section 404 jurisdiction to navigable waters as there was concern expressed by Senator Muskie and Hart, among others, that a large percentage of the nation's waters would be exempt from Section 404 regulation and could thereby be subject to unregulated toxic waste dumping. Leg. Hist. at 926 (Senate debate, Senator Hart), Leg. Hist. at 929, Senate debate, Senator Muskie). Of course this concern was unrelated to normal farming activities and as a result the bill which passed protected the farmer by exempting normal farming activities from Section 404 regulation.

Section 404(f) of the Clean Water Act, 33 U.S.C. § 1344(f) which contains the language championed by Senator Muskie, provides in relevant part:

> "(f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—
>
> > "(A) from normal farming, silvicultural, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
> >
> > . . . .
>
> "is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).
>
> "(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable water may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section."

Thus, Congress did not choose to limit the Section 404 jurisdiction of the Corps of Engineers over farmers by the type of water to be impacted, but instead chose specific exemption language which protected normal activities of farmers from Section 404 regulation. As stated by Senator Hart, the bill "does exempt activities which are normal farming or agricultural activities, run by individuals or family farmers." Leg. Hist. 907–08 (Senate debate).

Senator Chafee speaking in support of the committee bill confirmed that the amended Section 404 would not regulate normal farming activities, which some senators feared:

> "That does not mean that if you are a farmer, you cannot plow your field. That is one of the red herrings

that has been raised in this bill. No one was watching over this more carefully than our distinguished presiding officer. [Muskie] He comes from farmland. He made sure that the farmers are protected under the bill, and they are.

"But what we are talking about is just indiscriminately filling in, and that is what the committee bill takes care of." Leg. Hist. at 919–20 (Senate debate) (emphasis added).

Normal wetlands farming activities such as crop rotations and extent and duration of irrigation activities do not entail the indiscriminate filling in of wetlands. Unfortunately, the Ninth Circuit Court of Appeals did not understand the Clean Water Act of 1977 to have this limitation and focus. To the contrary, by the court's decision, these farmers are not protected by Section 404(f)(1), to even plow their fields free of regulation, but instead their every activity is subject to regulation and control if such activity may have some impact on the underlying "hydrological regime." This result is clearly contrary to the intent of the Clean Water Act of 1977.

B. The Circuit Court's Narrow Interpretation of the Subsection (f)(2) Recapture Provisions Improperly Grants the Corps of Engineers Control Over Day-to-Day Farming Activities

Section 404(f)(2) limits the "normal farming" exemption to Section 404 to farming activities which *do not have the purpose of bringing the farmland into a use to which it was previously not subject* if the new use will alter the hydrological regime. (*See* Appendix A at 1–2 to petitioners' brief.) This Section 404(f)(2) "recapture provision" has been interpreted by the lower court to wipe out the subsection (f)(1) exemption if " 'a change within the farming use' " is proposed[1] which may change the farmland's hydrological regime. Appendix B at 16–17. One clearly unintended effect of this ruling is to

[1] A change from one wetland crop to another wetland crop or to an upland crop.

subjugate certain crucial management decisions of farmers, such as what crops to plant, to the vicissitudes of the Corps of Engineers rather than the urgencies of the market.

Another practical and unintended effect of the Court's interpretation is that farmers will be reluctant to convert from upland farming to wetland farming if they know that once the conversion is made their farming will be subject to Section 404 regulation. Thus even though current market conditions may dictate the creation of dikes and irrigation ditches needed to flood an area to cultivate wetland crop, and even though such an activity would help to create additional wetlands[2] which are of important ecological, biological, and environmental benefit, farmers simply will not convert for fear of long-term regulatory costs.

For example, the production of rice requires soils capable of holding water. Three to four acre feet of water must usually be pumped in during the growing season in addition to normal rainfall. The water is drained to permit harvest. These fields could possibly be declared man-made wetlands which could trigger Section 404 jurisdiction.

Because rice fields must be level, certain clearing operations are always required before planting. Also, good agricultural management practices recommend that an ideal crop rotation program for rice production is one year of rice and two years of soybeans (an upland crop).[3] The 1984 estimated rice acreage was 4.2 million acres, with a cash

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[2] Between the mid-1950s and mid-1970s farming activities artificially created over two million acres of wetlands. National Wetlands Inventory, Wetlands of the United States, Current Status and Recent Trends, United States Department of the Interior, Fish and Wildlife Service at 31 (March, 1984).

[3] Information on rice production set forth above is contained in DELTA AGRICULTURAL DIGEST 1986, Farm Press Publications, Inc., p. 134–5.

value of nearly $1 billion in 1984.[4] If the COE is permitted jurisdiction over rice fields as "man-made wetlands" and the principles of the decision below permits regulatory authority over crop rotation decisions, it will needless to say have several adverse impacts on the rice industry.

Application of the lower court decision will impact other wetlands crops as well. Wild rice, which appellant desires to plant, is a relatively new cash crop with high earning potential. Very little modification to existing fields is required to manage the crop. However, requiring a farmer to submit wild rice management proposals to COE before changing from one wetlands crop to wild rice, gives the Corps complete control over such routine farm decisions and activities.

CONCLUSION

If permitted to stand, the Ninth Circuit decision below will have profound effects on that segment of American agriculture that depends on wetlands. Rice (planted over 4.2 million acres with a cash value of $1 billion), wild rice (a cash crop with high return potential) and cranberries (23,820 acres planted with a value of $1.8 billion) are but a few of the wetlands crops which would be affected by allowing the Corps of Engineers to have Section 404 permit authority over normal farming decisions associated with these crops.

Congress never intended the Section 404 program to have such a profound economic impact on America's farmers. Nevertheless, as interpreted by the lower court, Section 404 will delegate to the Corps of Engineers the authority to make day-to-day management decisions upon which the farmers' economic existence may depend. American Farm Bureau Federation urges the Court to grant the Akers' petition for writ of certiorari so that the Clean Water Act of 1977 can be properly interpreted to protect this nation's farmers from the

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[4] *Rice, Background for 1985 Farm Legislation*, USDA, Agricultural Information Bulletin No. 470.

insidious usurpation by the federal bureaucracy of a farmer's right to make his own management decisions.

DATED: July 23, 1986

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TABLE I

WETLANDS IN THE UNITED STATES (EXCLUDING ALASKA)

Source: SCS 1982 National Resources Inventory

State	Total Acres	Wetlands with Medium or High Potential for Conversion to Cropland
Alabama	3,783,800	400,900
Arizona	134,900	23,500
Arkansas	1,323,400	121,500
California	1,380,500	102,400
Colorado	484,600	22,400
Connecticut	317,200	12,000
Delaware	236,800	83,700
Florida	7,727,500	535,400
Georgia	4,898,200	173,100
Hawaii	66,600	(not available)
Idaho	432,900	57,100
Illinois	822,600	103,400
Indiana	221,400	45,000
Iowa	125,800	27,300
Kansas	28,200	1,200
Kentucky	318,400	74,600
Louisiana	6,068,200	144,300
Maine	1,899,900	18,100
Maryland	935,700	68,200
Massachusetts	485,700	12,100
Michigan	3,960,800	224,600
Minnesota	7,723,200	393,900
Mississippi	2,839,600	279,100
Missouri	116,100	27,300
Montana	774,900	68,500
Nebraska	759,000	156,300
Nevada	82,300	6,900
New Hampshire	226,900	1,600
New Jersey	544,700	8,000
New Mexico	64,100	2,700
New York	2,298,000	170,800
North Carolina	2,874,000	278,100

TABLE I—(Cont.)

State	Total Acres	Wetlands with Medium or High Potential for Conversion to Cropland
North Dakota	2,896,100	298,200
Ohio	826,200	169,300
Oklahoma	140,500	22,500
Oregon	752,600	117,500
Pennsylvania	651,500	90,800
Puerto Rico	38,000	(not available)
Rhode Island	81,600	400
South Carolina	3,941,500	179,000
South Dakota	1,531,100	98,000
Tennessee	751,400	157,700
Texas	2,799,100	101,200
Utah	1,092,400	11,100
Vermont	182,800	3,100
Virginia	1,269,800	51,100
Washington	436,800	99,500
West Virginia	31,800	5,300
Wisconsin	4,494,800	122,600
Wyoming	263,300	12,400
TOTAL	76,187,200	5,184,300